SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1923.

No. 26—Original.

IN THE MATTER *of* Transportes Maritimos do Estado, owner of the S.S. "Sao Vicente," upon the application of the Minister of the Republic of Portugal for a Writ of Prohibition and/or Mandamus, Petitioner, *against* HON. WILLIAM BONDY and HON. FRANCIS A. WINSLOW, Judges of the District Court of the United States for the Southern District of New York, Respondents.	RETURN.

I, WILLIAM BONDY, one of the Judges of the District Court of the United States for the Southern District of New York, in obedience to the rule to show cause herein, issued out of this Court on the 22nd day of October, 1923, upon a petition attached thereto, directing me and the

other Judges of the said District Court to show cause why a writ of prohibition and/or mandamus should not issue, in accordance with the prayer of said petitioner, hereby appear herein, and, asking for the refusal of the writs and for the dismissal of the petition upon the grounds and facts hereinafter set forth, on behalf of myself and of Judge Winslow and of the other Judges and officers of our District Court, to whom the rule to show cause is directed, do hereby certify and make return as follows:

(1) It is true that a libel was filed in our District Court of the United States for the Southern District of New York, entitled Stephen Ransom Dry Dock & Repair Corporation *vs.* the S.S. "Sao Vicente," her engines, etc., and that process was duly issued and that thereafter proceedings were taken in our Court in the exercise of jurisdiction thereunder, resulting in a final decree in favor of the libelant, which decree was affirmed upon appeal by the United States Circuit Court of Appeals for the Second Circuit. This proceeding is instituted by a petition for a writ of prohibition and/or mandamus to stay the further proceedings by our Court in that case.

(2) The material proceedings taken in our Court were as follows:

Libel *in rem*, filed April 14th, 1921 (Petition, Page 15).
Process *in rem*, issued April 14th, 1921 (Petition, Page 20).
Vessel arrested, April 14th, 1921 (Petition, Page 20a).
Claim of Transportes Maritimos do Estado, owner, filed April 15th, 1921 (Petition, Page 18).
Surety Company stipulation for value, filed April 15th, 1921 (Petition, Page 21).
Extensions of time to answer obtained by vessel.

Order entered substituting F. M. Patterson as proctor for claimant May 27th, 1921 (Return, Page 24, *infra*).

Answer to libel, filed by claimant May 31st, 1921 (Petition, Page 27).

Order entered substituting F. Dudley Kohler as proctor for claimant, Nov. 26, 1921 (Return, Page 25, *infra*).

Motion for interlocutory decree and order of reference submitted, and not opposed, and granted, June 5th, 1923.

Interlocutory decree entered without opposition, June 9th, 1923 (Petition, Page 31).

Proceedings before Special Master, begun June 18th, 1923, completed June 28, 1923 (Return, Pages 13-15, *infra*).

Petition, Suggestion and Information of Portuguese Minister, without certificate of Suggestion from Secretary of State, *filed, July 5th, 1923* (Petition, Page 33, *et seq.*)

Motion for order striking petition and suggestion from the record argued and motion granted, July 10th, 1923.

Order entered striking suggestion from record July 13th, 1923 (Petition, Page 48).

Special Master's report, filed July 9, 1923.

Exceptions to Special Master's report, filed July 19th, 1923 (Return, Page 26, *infra*).

Exceptions argued and overruled, July 31st, 1923.

Final decree submitted and entered, August 9th, 1923 (Petition, Page 46).

Notice of appeal, assignments of error, bond on appeal, petition and citation for allowance of appeal direct to Supreme Court (no certificate of question of jurisdiction) filed, order of allowance signed, August 20th, 1923 (Petition, Page 51; Return, Page 27, *infra*).

Application for certificate as to want of jurisdiction submitted to and refused by Judge Winslow, September 1st, 1923 (Return, Page 18, *infra*).

Order vacating appeal to United States Supreme Court direct for lack of certificate as to jurisdictional question entered September 13th, 1923 (Petition, Page 53).

Notice of appeal to the Circuit Court of Appeals, amended assignments of error and supersedeas bond, filed September 15th, 1923 (Return, Page 28, *infra*).

Appeal argued in Circuit Court of Appeals, October 1, 1923—District Court decree affirmed (Return, Page 19, *infra*).

Mandate of Circuit Court of Appeals, affirming decision appealed from, filed (Return, Page 19, *infra*).

Decree on mandate, filed October 15, 1923.

The present rule was thereafter issued by the Supreme Court under date of October 22, 1923.

(3) At the outset two very material facts must be noted in respect to the suit in our Court. First—The suit was brought in Admiralty in rem, i. e., against the S.S. "Sao Vicente" alone, and not in personam against the Transportes Maritimos do Estado or against the Republic of Portugal or its Minister. Second,—the appearance made for the vessel in the suit was a general and not a special appearance. It was without any restrictions and at no time during the case has there been any attempt to claim this a special appearance or to preserve any questions of restricted appearance or jurisdiction over the person or vessel or to withdraw it. The petition refers to this as a general appearance (Petition, Paragraph 5, Page 7; Page 34). Throughout the entire course of proceedings in our Court claimant relied upon this as a general appearance and merely questioned its effect.

(4) The appearance and bond were filed for the vessel at the outset and in the name of the Transportes Maritimos do Estado, claimant, as sole owner. This claim of owner and appearance and bond were filed by the vessel's agents through proctors of high standing in our Court. The vessel's agents, through these proctors, prayed for, and obtained, the release of the vessel upon substituting therefor a surety company bond for value. The proceedings were in all respects usual and regular.

(5) The claim of owner was so drawn as to indicate private or corporate ownership. There was no indication of Government ownership or immune character. The name of the sole owner was given as Transportes

Maritimos do Estado. The petition admits that this entity is the owner by saying (Paragraph 3, Page 6):

"3. That the status of said Steamship Sao Vicente was * * * and is a steamship owned by the Transportes Maritimos do Estado * * *,"

(6) Everything pointed to the presence of jurisdiction, as the suit was for repairs ordered by the master of the vessel while in this port, and she was seized within the waters under our jurisdiction. After her arrest, a bond of a domestic surety company was promptly substituted in her place and stead and the vessel released.

(7) The petition does not attempt to question our jurisdiction over the subject matter. The claimant never raised this question before us.

(8) No claim or suggestion of privilege or immunity was ever presented to our Court by or through the State or Judicial Department of the United States. The petition and suggestion of your petitioner were not presented to our Court until just prior to the entry of the final decree—some two years after the seizure of the vessel. The present petition is by the proctor and not by the Diplomatic representative.

(9) On the face of the petition the only question raised is as to the effect of this general appearance on any special privilege which the vessel might have been entitled to claim. This is not a question as to jurisdiction of the Court as a Federal Court or as to the wrongful assumption of jurisdiction or the excessive exercise of a rightful jurisdiction so as to be a subject for the writs here sought. It is a question of law, itself within the jurisdiction of our Court, and any error of decision is reviewable in the ordinary courses of appeal and not by the present proceeding.

Replying specifically to the petition, I respectfully certify to this Court the following:

(10) It is true, as alleged in Paragraph 2 of the petition, that the Portuguese merchant steamship "Sao Vicente" was duly seized and arrested on April 14th, 1921, in the port of New York, and in waters within the jurisdiction of the District Court for the Southern District of New York, by the United States Marshal for the Southern District of New York, under Admiralty process *in rem* duly issued out of our Court, upon the prayer set forth in the libel *in rem* referred to. (For copy, of Libel, see Petition, Page 15; of process *in rem* and return of Marshal, Petition, Page 20).

(11) No proof of the matter alleged in paragraph designated 3, Page 6, of the Petition, was ever offered to our Court, although ample opportunity to do so was extended to the vessel. It is, however, true that some of these matters were suggested to the Court by the answer filed after the general appearance and bond and the release of the vessel, and, some two years later, by the Petition of the Minister of the Republic of Portugal. But these were merely informal suggestions and the action taken in respect thereto will appear below.

(12) No proof was offered as to the allegations of, or inference sought to be conveyed in, paragraph designated 3 (Petition, Page 6), as to the S.S. "Sao Vicente" being engaged as a transport and sovereign government cargo carrier. In fact it appeared that the "Sao Vicente" was a general merchant and passenger ship engaged in private commerce from our port. It was not an

armed vessel. It was not a transport. This is admitted by claimant. (See brief in support of this rule, Point V, page 20). There appeared in the classified shipping advertisements of the Journal of Commerce of New York just prior to the arrest of this vessel advertisements soliciting general cargo and passengers.

(13) It is likewise true, as alleged in paragraph designated 4 (Petition, Page 6), that thereafter, on April 15th, 1921, the vessel appeared generally and filed a general appearance and claim of owner, as proceeded against *in rem,* together with stipulations of a domestic surety company for value in the sum of Thirteen Thousand Five Hundred Dollars ($13,500) and for costs in the sum of Two Hundred and Fifty Dollars ($250). (For copy, of Claim, see Petition, Page 18; of Stipulation for Value, Page 21, et seq.). The vessel was thereupon released from arrest and left the jurisdiction of this Court so far as this libel was concerned.

(14) It is likewise true that the claim of owner alleges that the Transportes Maritimos do Estado—

"* * * intervening for its interest in the said S.S. *Sao Vicente,* * * * appears before this Honorable Court * * *, was in possession of the said steamship * * *, is the true *bona fide* owner of the Steamship *Sao Vicente,* and that no other person is the owner thereof; wherefore it prays to defend accordingly." (Petition, Page 18.)

This was executed and acknowledged before a notary public in the following manner:

"Transportes Maritimos do Estado,
By C. B. Richard & Co., Agents,
By Leonard W. Simmons, a Partner".

It will be noticed that this is contrary to the language

of the preamble to the present Petition (Page 5) which asserts the Republic of Portugal as the owner.

(15) The stipulations for costs and for value were both executed by the American Surety Company of New York as surety, and were likewise executed by or on behalf of the vessel in the same identical manner as was the claim (Petition, Page 22). It will be observed that these stipulations provide, among other things—

> "And the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or its surety, execution for the agreed amount, with interest thereon from this date, may issue against their goods, chattels and lands,"

and that the condition of the bond is that, if the claimant or the said surety—

> "shall abide by all the orders of the Court, interlocutory or final, and pay the amount awarded by the final decree rendered by this Court, or by any Appellate Court if an appeal intervene, with interest, then this stipulation to be void, otherwise to remain in full force and virtue." (Petition, Pages 21 and 22.)

These papers were presented to our Court and the release of the vessel prayed for and obtained by the firm of Barry, Wainwright, Thacher & Symmers, who are reputable proctors of this Court, specializing in Admiralty proceedings, appearing for the vessel.

(16) Up to this point there was not the slightest indication of the want of or question of jurisdiction of this Court over the subject matter or over the *res* in this suit. On the contrary, everything pointed to the presence of jurisdiction and to the regularity of the proceedings. Had the vessel or its master or its agents or claimant sought to question the jurisdiction of the Court over the vessel, our procedure provides for the protection of

such right or question by the means of special appearance, wherein such questions may be reserved. We have the further practice in such cases of providing for the special release of the vessel without prejudice to such questions, so that it need not be delayed pending their determination. See, "The Gleneden", sub nomine Ex Parte Muir, 254 U. S. 522, 530. In all such cases such reservation must be taken at the very outset by appropriate measures, and such appropriate steps must continue throughout the course of the litigation. We respectfully point out that no such appropriate measures were taken in this case.

(17) There was nothing before our Court to indicate that the appearance of the vessel and the filing of the bond and the acceptance of the release of the vessel were without conceding or recognizing the right of our Court to arrest the vessel, as is alleged in paragraph designated 4 (Petition, Page 6), nor was any proof ever tendered to this Court of the want of authority on behalf of the proctors or those appearing for the vessel.

(18) It will be noted that that paragraph of the petition alleges that such claim was filed "without any authority of the Republic of Portugal," but this does not seem to dispute that it was with authority of the vessel's agents or of the Transportes Maritimos do Estado itself. In his previous petition and suggestion, the petitioner had asserted that such appearance was made under a mistake of law (Petition, Page 34), *i. e.*, it was with authority, but by mistake as to effect. The paragraph does not allege that C. B. Richard & Company were not

general agents of the vessel or that there was any lack of authority on their part to act for it. However this is immaterial as the brief in support of this rule, Page 31, Point 8, expressly admits the appearance and claim were in fact by the Transportes Maritimos.

(19) The Petition does not mention the next step, which was the entry, on May 27th, 1921, of an order for the substitution of Frank M. Patterson, an attorney of this Court, in the place and stead of Barry, Wainwright, Thacher & Symmers, as proctors for the vessel. (Copy annexed hereto, Page 24.) It will be noted that no reference to claim of special appearance is made therein and was before answering.

(20) Under our court rules an answer must be filed within two weeks after process returned. The claimant procured extensions of time within which to file an answer, and on May 31st, 1921, nearly six weeks after the vessel had appeared and been released, the answer was filed (for copy, see Petition, Page 37, et seq.).

(21) It is not true, as alleged in the petition (Paragraph designated 5, Page 7), that this answer denied the material allegations of the libel. On the contrary, it admits that the necessary work claimed for was done on, and the dockage and wharfage supplied to, the vessel, the denial being merely as to the amount. No issue as to authority of counsel appearing and answering for the vessel has ever been raised or argued before us.

(22) The point of the answer appears in its further answering clause as a separate and sole defense. This

answer, after praying that by reason of international comity the settlement of the case should be transferred to the court of the Portuguese Consul and not to our Courts, affirms the ownership of the vessel in the Transportes Maritimos do Estado and alleges the privilege of immunity from arrest on the ground that that entity is a department of the Portuguese Government, and as such the entity should not be suable in our Courts, and that this suit is thus, in substance and effect, a suit against the Portuguese Government and prays for the dismissal of the libel with costs.

(23) It is notable that this defense or claim to immunity was asserted and the answer verified not by the agents of the vessel or claimant, but by the Portuguese Consul at this port. It is notable also that the special defense is advanced, not upon knowledge of facts, but merely upon information and belief, based on "*communications received from the agents of the Steamship 'Mormugao'*" (Petition, Page 30). The answer was not supported by any certificates from the State or Judiciai Departments of the United States, or even from the diplomatic representatives of the Government of Portugal. It was in all respects identical with the pleading advanced by this petitioner as owner of this vessel in other suits in our Court and which had previously been held by us insufficient in the cases of *Tietjen & Lang Dry Dock* vs. *the S.S. "Sao Vicente"* and four other suits, and which decisions were affirmed by the Circuit Court of Appeals (281 Fed. Rep. 111), and appeal dismissed by the Supreme Court upon *certiorari* (The Sao Vicente, 260 U. S. 151) upon that ground.

(24) In itself this answer submitted to us for our decision the question of its right to then assert and be given this privilege and also to a dismissal with costs. We decided against it.

(25) The answer seems to ignore the fact that this suit is *in rem* against the merchant vessel and not *in personam* against the Government or the Transportes Maritimos do Estado. There is no respondent in this case, only a claimant, and this becomes important in view of the later attempt of the proctor for claimant to treat the suit as one *in personam* with the Transportes Maritimos do Estado and Republic of Portugal as respondent.

(26) Again no mention is made in the petition of the entry of an order, on November 26th, 1921, for the substitution of F. Dudley Kohler as attorney for the vessel herein. (See copy annexed hereto on Page 25.) No reference is made therein to claim of special or reserved appearance.

(27) No further proceedings were had herein by either party until *June 5th, 1923,* when the case was brought on before me (not before Judge Winslow, as alleged in the petition, Paragraph 6, Page 7), upon libelant's motion for an interlocutory decree and order of reference to compute the amount due, based on the insufficiency of the answer as a defense.

(28) It is not true, as alleged in the petition (top of Page 8) that upon that hearing there was raised or argued any question of the right and jurisdiction of this Court to hear and determine the matters alleged in the libel or to enter such interlocutory decree. On the

contrary, after libelant's proctor had stated the case, the proctor for the vessel, F. Dudley Kohler, Esq., for his reply, stated that there was no issue on the merits as to the ordering of or furnishing of the work, supplies and dockage, and that, in view of the decision of the Supreme Court entitled Transportes Maritimos do Estado, claimant of the S.S. "Sao Vicente" vs. Tietjen & Lang Dry Dock Company, and four other cases (260 U. S. 151), there was no other course open to the Court but to grant the motion and interlocutory decree and to refer the question of amount to a Special Commissioner, *and that he therefore did not object thereto.*

(29) Upon such consent, and upon the authority of the aforesaid decision, the interlocutory decree was entered on June 9th, 1923 (for copy, see Petition, Page 31). No formal opinion was rendered by me, as, under such circumstances, no issue was presented necessitating an opinion.

(30) After the entry of this decree, proceedings were begun before the Special Commissioner named. The minutes of those hearings, now on file in this Court, show that at the first hearing the following appearances were noted and proceedings had:

"June 18, 1923,
2:30 p. m.

Before
BEN A. MATTHEWS, Esq.,
Special Master.

* * *

APPEARANCES:

CLARENCE K. MCGUIRE, Esq., proctor for Libellant;

F. DUDLEY KOHLER, Esq., proctor for Claimant.

The hearing was held in the office of the Special Master, 2 Rector Street, New York City.

Pursuant to agreement between proctors for libellant and claimant, the fees of the Special Master are to be fair and reasonable charge.

It was further agreed that each side would pay for its own carbon copy of the minutes and that the cost of the original or Special Master's copy would be divided equally between the parties.

* * *

Mr. McGuire, proctor for libellant, filed notice of hearing with admission of service thereon bearing this date.

Mr. Kohler, proctor for claimant, thereupon made application for an adjournment for one week and suggested that the hour be fixed at 3:15 instead of 2:30.

> Mr. McGuire: I do not object to the adjournment, but I want to go ahead at the next hearing and close the matter certainly next week.
>
> The Special Master: This matter is therefore adjourned for one week to June 25th at 3:15 p. m., at this office."

On the adjourned date the same appearances were noted, and the libelant produced its proof as to amount of claim. Among other testimony then taken was the following given by E. A. Plunkett, a witness for libelant:

"Q. Will you state what that work was, beginning with the arrival of this ship in the Port of New York? A. When the vessel arrived here—it was some time around the first of March, 1921—she proceeded to Pier 1, North River. It was of a Saturday afternoon. They were unable to moor the vessel properly owing to the winches and windlass and mooring engines being disabled. I was ordered by Mr. Hyland——

Q. Mr. William E. Hyland? A. Yes, Mr. William E. Hyland, who was Superintending Engineer at that time for C. B. Richard & Co., the latter being the general agents of the vessel, to proceed with this work with all possible speed."

No testimony was offered by claimant to controvert or to question this or disprove the amount of the claim. The minutes further show the following as part of a subsequent colloquy between the Special Commissioner and the proctor for the claimant (italics being ours):

"The Special Master: Was any bond filed for this ship by any other person or government or authority whatsoever besides C. B. Richard & Co.?

Mr. Kohler: No.

The Special Master: Was there any appearance entered by any other party?

Mr. Kohler: *A general appearance was entered by Frank M. Patterson,* who was retained by the Consul General of Portugal. And the Minister of Portugal, in Washington, *has stated in other cases* that the Consul General did not have the authority to retain counsel to appear generally, and that the act of counsel in appearing generally was a mistake; and that the Government has passed a law to pass on all claims against it and has appropriated a sum of money to pay them, and all claims are now being settled by the Government in their Government Bureau by the Liquidating Commission.

The Special Master: Somebody must be before the Court on the other end of this litigation or else it is a proceeding *in rem* without a claimant. You, I assume, are appearing here——

Mr. Kohler: As a substitute for Mr. Patterson.

The Special Master: You are appearing here on behalf of Mr. Patterson. Claimant appeared by Mr. Patterson and you are taking that appearance.

* * *

On the record, as it stands, I think a *prima facie* case has been made out. Have you any testimony to offer in rebuttal?

Mr. Kohler: It seems to me the testimony already offered is not sufficient to make out a case because it has not shown the value of the services or materials rendered."

The Special Master: From the testimony offered it would appear that the bill was presented and signed by the agents who agreed on the items and the figures and the value. At any rate I shall so take it unless you offer something in rebuttal.

* * *

At 5:00 p. m. the hearing was adjourned to Thursday, June 28th, 1923, at 3:30 p. m."

(31) It appears that no further testimony was offered, and claimant's proctor subsequently submitted the case on the testimony already taken.

(32) It is true, as referred to in paragraph 8 (Petition, Page 8), that on *July 5th, 1923* (and not 1921 as stated, Page 33), there was filed with the Clerk of our Court a document entitled in this case as a "Suggestion, Petition and Information" (a copy of which is set forth on Pages 33 to 45, inclusive, of the

Petition). No evidence of the matters therein referred to was offered. This document was in reality a petition that our Court accept the suggestion as true without further proof and dismiss the libel forthwith.

(33) But it is also true of this document that, aside from being offered two years after the general appearance had been entered and after all the other proceedings had been had, it was not supported by the intervention of our State Department, or even by its certificate as to the facts. The contrary statement appears at the foot of the certificate (Petition, Pages 40 and 44). Nor was it in the form prescribed by the decisions to be admissible or binding on our Courts in such matters. It was therefore not in due form as alleged in the petition (Paragraph 8, Page 8).

(34) On July 10th, 1923, libelant moved this Court, upon due notice, to strike this petition and suggestion from the record. This motion was brought on for argument and, after due deliberation, was granted and an order to that effect entered on July 13th, 1923 (Petition, Page 48).

(35) The Special Commissioner on July 9th, 1923, filed his report finding in favor of libelant for the amount of the claim. Claimant filed exceptions to this on July 19th, 1923 (for copy thereof, see Page 26, *infra*). These exceptions were brought on for argument before Judge Winslow upon a motion to confirm the report, and were overruled, on July 31st, 1923.

(36) Thereafter, as alleged in Paragraph 9 (Petition, Page 8), on August 9th, 1923, the final decree was duly entered in favor of the libelant and against the vessel and its stipulator, which was the American Surety Company of New York. This decree was entered upon notice, and was submitted without objection (for copy, see Page 46 of Petition). It is not a decree against the Transportes Maritimos do Estado in personam or against the Republic of Portugal. It condemns the stipulator for value.

(37) It is true, as alleged in Paragraph 10 (Petition, Page 9), that on August 20, 1923, an order was entered by me allowing claimant an appeal direct to the Supreme Court of the United States. This order was presented to me *ex parte* by the Deputy Clerk of our Court, and was signed, in ordinary routine. With it were presented notice of appeal to the Supreme Court of the United States from the interlocutory and final decrees herein, assignments of error going to the merits, and a supersedeas bond. (See Petition, Pages 51 and 52, and a copy of notice, annexed hereto, Page 27.)

(38) It was promptly brought to my attention by motion to vacate, that there was no certificate of a Trial Judge on the question of jurisdiction, as required by Section 238 of the Judicial Code, and further that the appeal was on the general merits as well and was not on a question of jurisdiction alone. As alleged in Paragraph 10 (Petition, Page 9), an application for such certificate was made to Judge Winslow which was re-

fused by him on September 1st, 1923, with a memorandum decision reading:

"Application for within certificate is denied. See 'The Sao Vicente,' 260 U. S. 151."

Thereupon, after hearing the respective counsel, I granted the motion and entered an order vacating the said order of allowance of direct appeal. This was entered September 13th, 1923 (for a copy thereof, see Petition, Page 53).

(39) It is true, as alleged in Paragraph 10 (Petition, Page 9) that thereupon claimant, still acting in its own name, Transportes Maritimos do Estado, and under its general appearance, appealed to the Circuit Court of Appeals for the Second Circuit, not only from the final and interlocutory decrees herein, but also from my order of September 13th, 1923, vacating the appeal direct to the Supreme Court. (Copy of notice is annexed hereto, Page 28.) A copy of the same assignments of error as above referred to was filed thereon. The purpose or intention of petitioning said court to certify a question nowhere appeared.

(40) Claimant thereupon filed a new and additional surety company cost bond on appeal and a supersedeas bond. These bonds were likewise executed for the claimant in substantially the same manner as the original stipulations for value and costs (*supra*). (Copy annexed hereto, Page 29.)

(41) The argument of this appeal was advanced in the Circuit Court of Appeals. Contrary to the allega-

tion of the petitioner in Paragraph 11 (Petition, Page 9), the decree of the District Court was unanimously affirmed. The appeal was not dismissed.

(42) I am informed that on the argument the record from our Court, including my order of September 13, 1923, was presented to the Circuit Court of Appeals and a full and detailed argument was had, and advocates for both sides were heard at length on the questions of jurisdiction, effect of the appearance, the striking out of the suggestion, issue of amount, and the order of this Court of September 13th, 1923 vacating allowance of direct appeal to the Supreme Court, the merits of the claim, and other matters, and that no request was made to the Court to certify any question of jurisdiction to the Supreme Court. The Circuit Court of Appeals rendered the following decision and order for mandate:

"It is hereby ordered on the within motion that the decree of the District Court in the within case is affirmed with costs, interest and damages at the rate of five per cent. under Rule 27 of this Court."

The Court Rule referred to provides:

"In all cases where a writ of error shall delay the proceedings on the judgment of the lower court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

The same rule shall be applied to decrees for the payment of money in cases of equity and admiralty, unless otherwise ordered by this court."

The mandate on said decision was duly filed in our Court and a decree thereon duly entered.

(43) There is nothing in the record in our Court which would tend to bear out the representations made in Paragraph 12 (Petition, Pages 9 and 10), or to indicate that the suit referred to was, either in substance or effect, against the sovereign government of the Republic of Portugal, or that our District Court was, or now is without jurisdiction to proceed in respect to the matter. On the other hand, everything pointed to our jurisdiction of the subject matter, and also of the res or person, and it is clear that the proceeding, through substitution of the bond, is both in substance and effect against a domestic surety company.

(44) The letter from Lloyd's Register of Shipping, set forth on Page 55 of the Petition, was never submitted to our Court. Its date indicates it was too late.

I respectfully submit:

(a) That our District Court of the United States for the Southern District of New York had jurisdiction of the subject matter and of the res or person of the vessel and properly retained and exercised such jurisdiction to conclusion.

(b) That any question as to our jurisdiction over the res or person of the vessel should have been asserted at the outset before the vessel appeared generally and obtained its release, and such question should have been reserved by appropriate protective measures, which steps were not taken in this case.

(c) That the proceedings taken by the vessel and its claimant at the outset constituted a waiver of any

question of privilege and amounted to a submission to the jurisdiction of our Court, which could not later be withdrawn by any such proceedings as were taken here.

(d) That any question as to the effect of the general appearance of the vessel and substitution of the surety bond in its place was a question of law within the jurisdiction of our Court and directly submitted to our Court by the answer, and that the vessel, or its claimant, has or had a right of review by the ordinary channels of appeal, and that the extraordinary remedies here sought —the writs of mandamus and prohibition—are not the appropriate remedies and are not open to the petitioner under the circumstances of this cause.

(e) That the Petition is not by or on behalf of the vessel, or its claimant, but by an independent and outside party who has not heretofore appeared herein, and that as the Petition affirms the ownership of the vessel to be in the Transportes Maritimos do Estado, as alleged in the claim and the notice of appearance it would appear that the petitioner has no standing to pray this Court, as he does, to vacate the decree of our District Court and to discharge the appearance and bond filed by the vessel itself and to dismiss this libel.

(f) The petition is not executed by any diplomatic representative of the Republic of Portugal, that is, the Minister or, in his absence, the Charge d'Affaires, who would have the authority, but by the proctor who has appeared for the vessel in our Court for over two years. It is not supported by any intervening suggestion from our own government, and cannot be accepted as true upon

its face, and no proof of the facts alleged in the petition was ever offered to this Court during the two years or more that this cause has been pending in our Court, although the vessel and its claimant and the petitioner had ample opportunity so to do, and, in fact, were called upon by our Court to offer such proofs as they might deem advisable.

(g) Petitioner seeks a review by this method instead of the usual course of appeal.

(h) The petitioner seeks, not only a review, but, by the writ of mandamus, to have the Supreme Court direct the District Court to reverse its opinion and decisions, rendered in the exercise of its judgment and discretion, which is a remedy not within the power of the Supreme Court or within the office of the writ of mandamus.

(i) The Courts are not concerned with what the present ownership of the vessel may be as the result of Government liquidation or merger of its former operators. The vessel appeared and submitted to our jurisdiction at the very outset and any subsequent steps to assert a lack of jurisdiction taken over two years later were an afterthought and too late.

Having fully answered the petition, it would appear that the rule to show cause, granted thereon, should be dismissed, and that the writ of prohibition, and also the writ of mandamus, sought by the petitioner should be denied, and that Hon. Francis A. Winslow, the other Judges and officers of our District Court for the Southern District of New York, and I should be hence dismissed.

IN WITNESS WHEREOF, I, WILLIAM BONDY, one of the Judges of the District Court of the United States for the Southern District of New York, have hereunto set my hand and the seal of the said Court this 3rd day of January, 1924.

WM. BONDY,
Judge of the District Court of the United States for the Southern District of New York.

I, FRANCIS A. WINSLOW, one of the Judges of the United States District Court for the Southern District of New York referred to in the rule to show cause herein, do hereby appear in response to the said rule, and do certify that I have read the foregoing return thereto, and find the same to be correct in so far as it refers to the proceedings taken before me, and I hereby join in submitting the said return to the consideration of this Honorable Court, and do hereby join in the prayer that the said rule to show cause be dismissed.

Dated, New York, January 3rd, 1924.

FRANCIS A. WINSLOW,
Judge of the District Court of the United States for the Southern District of New York.

ORDER OF SUBSTITUTION.

At a Stated Term of the United States District Court for the Southern District of New York held in the Court House, Post Office Building, Borough of Manhattan, City of New York, on the 27th day of May, 1921.

Present:
HONORABLE AUGUSTUS N. HAND,
U. S. D. J.

STEPHEN RANSOM DRY DOCK & REPAIR CORPORATION,
Libellants,

against

THE STEAMSHIP "SAO VICENTE", her engines, tackle, etc.,
Respondent.

On the annexed consent and on motion of FRANK M. PATTERSON, Esq., Proctor for the respondent herein, it is hereby

ORDERED that FRANK M. PATTERSON be, and he hereby is, substituted for and in the place of BARRY, WAINWRIGHT, THACHER & SYMMERS, Esqs., as Proctor for the respondent herein.

AUGUSTUS N. HAND,
U. S. D. J.

We consent to the entry of the above order.
BARRY, WAINWRIGHT, THACHER & SYMMERS.

ORDER OF SUBSTITUTION.

At a Term of the District Court, held in and for the Southern District of New York, at the Post Office Building, in the Borough of Manhattan, City of New York, on the 26th day of November, 1921.

Present:
HON. JOHN C. KNOX,
District Judge.

STEPHEN RANSOM DRY DOCK & REPAIR CO., INC.,
Libellant,
against
THE STEAMSHIP "SAO VICENTE", her engines, tackle, etc.,
Respondents.

UPON reading and filing the annexed consent of FRANK M. PATTERSON, and of GEORGE S. DUARTE, Consul General of Portugal in the State of New York as the lawful representative of the owners of the above named Steamship "Sao Vicente", the respondents herein, who reside and have their place of business in the Republic of Portugal, and on motion of F. Dudley Kohler, it is hereby

ORDERED, that F. Dudley Kohler of No. 25 Broadway, Borough of Manhattan, City of New York, be, and he hereby is substituted in place of Frank M. Patterson, as proctor for the respondents in the above entitled action.

JOHN C. KNOX,
U. S. D. J.

EXCEPTIONS TO REPORT OF COMMISSIONER.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

RANSOM DRY DOCK & REPAIR CORPORATION, Libellant, *against* S/S SAO VICENTE, her engines, etc., TRANSPORTES MARITIMOS DO ESTADO, Claimant.	78/226

The respondent herein hereby excepts to the report of Ben A. Mathews, Esq., Commissioner, under the interlocutory decree herein, filed the 9th day of June, 1923, as follows:

1. Because the said Commissioner found that the libellant, rendered services and furnished materials to respondent of the reasonable value of $15,152.12.

2. Because the said Commissioner received in evidence the bills alleged to have been rendered by libellant, no proper basis having been laid for their reception.

3. Because the said Commissioner committed errors in the taking of testimony and his rulings thereon as evidenced by the objections and exceptions taken by the claimant as more fully appears in the minutes.

Dated, New York, July 19, 1923.

Yours &c.,
F. DUDLEY KOHLER,
Proctor for Claimant,
Office & Post Office Address,
25 Broadway,
Borough of Manhattan,
New York City.

To:
CLARENCE K. MCGUIRE,
Proctor for Libellant,

To:
The Clerk of the U. S. District Court.

NOTICE, APPEAL TO U. S. SUPREME COURT.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

STEPHEN RANSOM DRY DOCK AND REPAIR CORPORATION, Libellant, *against* STEAMSHIP "SAO VICENTE", her engines, etc., TRANSPORTES MARITIMOS DO ESTADO, Claimant-Respondent.	A. 78-226. NOTICE OF APPEAL.

SIR:

PLEASE TAKE NOTICE, that the claimant-respondent herein appeals to the Supreme Court of the United States from the final decree of this Court, filed and entered on the 9th day of August, 1923, in the office of the Clerk of this Court, and from each and every part thereof, and also from the interlocutory decree filed and entered in said Clerk's office on the 9th day of June, 1923, and from each and every part of said interlocutory decree.

Dated, New York,

Yours etc.,
F. DUDLEY KOHLER,
Proctor for Claimant-Respondent,
Office & Post Office Address,
25 Broadway,
Borough of Manhattan,
New York City.

To:
CLARENCE K. McGUIRE,
Proctor for Libellant,
15 William Street,
New York City.

To:
ALEXANDER GILCHRIST, JR., Esq.,
Clerk of U. S. District Court,
Southern District of New York.

NOTICE, APPEAL TO CIRCUIT COURT OF APPEALS.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

STEPHEN RANSOM DRY DOCK AND REPAIR CORPORATION, Libellant, *against* STEAMSHIP "SAO VICENTE", her engines, etc., TRANSPORTES MARITIMOS DO ESTADO, Claimant-Respondent.	A. 78-226. NOTICE OF APPEAL.

SIRS:

PLEASE TAKE NOTICE, that the claimant-respondent herein appeals to the Circuit Court of Appeals for the Second Circuit from the final decree of this Court, filed and entered on the 9th day of August, 1923, in the office of the Clerk of this Court, and from each and every part thereof and also from the interlocutory decree filed and entered in said Clerk's office on the 9th day of June, 1923, and also from an order of this Court, filed and entered in said Clerk's office on the 13th day of September, 1923, and from each and every part of said order.

Dated, New York, September 15th, 1923.

Yours etc.,
F. DUDLEY KOHLER,
Proctor for Claimant-Respondent,
Office & Post Office Address,
25 Broadway,
Borough of Manhattan,
New York City.

To:
CLARENCE K. MCGUIRE, Esq.,
Proctor for Libellant,
15 William St.,
New York City.

To:
ALEXANDER GILCHRIST, JR., Esq.,
Clerk of U. S. District Court,
Southern District of New York.

SUPERSEDEAS BOND.

AMERICAN SURETY COMPANY
OF NEW YORK.

DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF NEW YORK.

STEPHEN RANSOM DRY DOCK AND REPAIR CORPORATION,
Libellant,
vs.
STEAMSHIP "SAO VICENTE", her engines, etc., TRANSPORTES MARITIMOS DO ESTADO,
Claimant-Respondent.
78-226.

KNOW ALL MEN BY THESE PRESENTS, That we, TRANSPORTES MARITIMOS DO ESTADO, and the AMERICAN SURETY COMPANY OF NEW YORK, having an office and principal place of business at No. 100 Broadway, Borough of Manhattan, City of New York, as Surety, are held and firmly bound unto the above named STEPHEN RANSOM DRY DOCK AND REPAIR CORPORATION, in the sum of One Thousand Six Hundred and 00/100 ($1,600.00) Dollars, to be paid to the said STEPHEN RANSOM DRY DOCK AND REPAIR CORPORATION, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and DATED this 18th day of September, 1923.

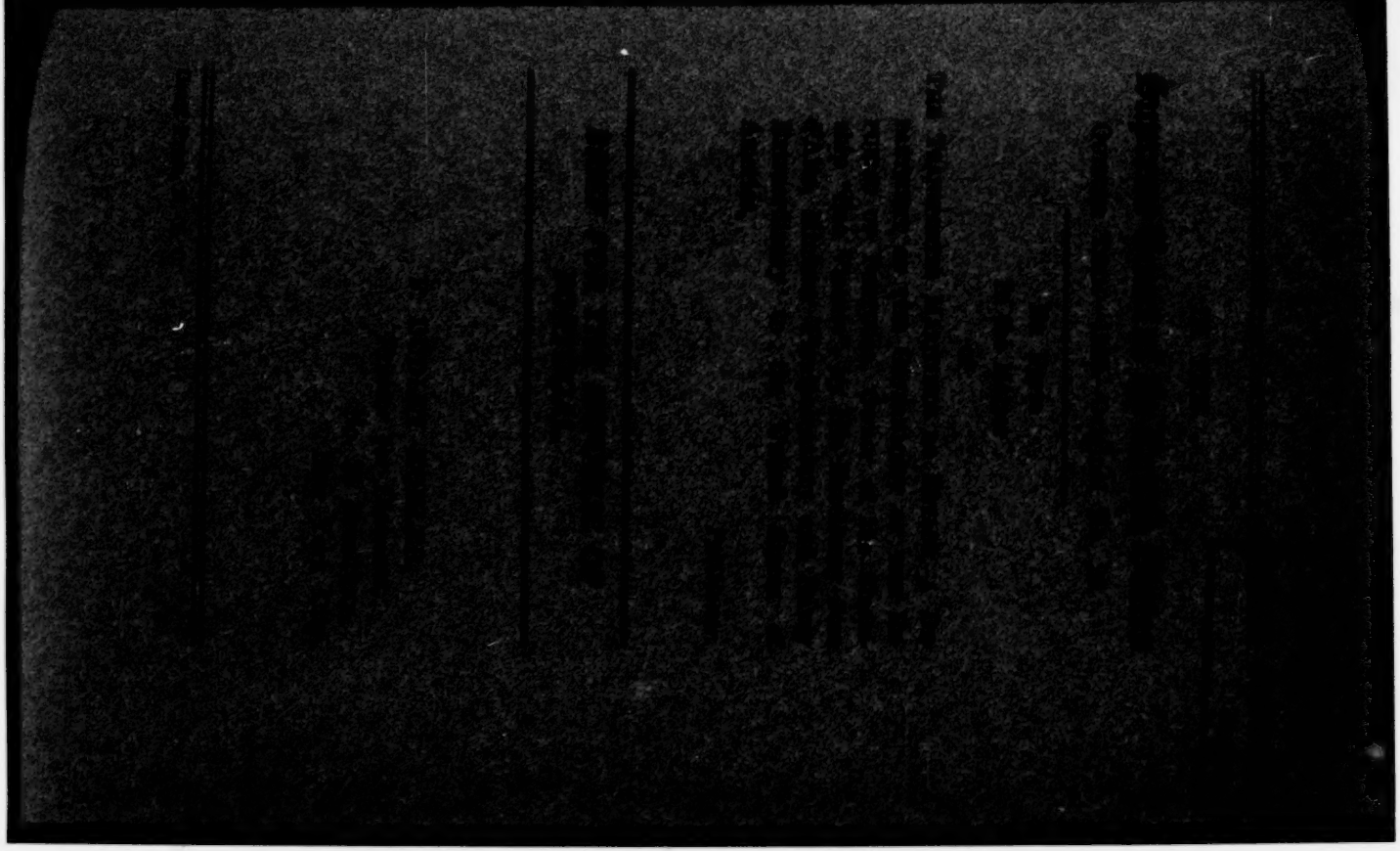
WHEREAS, the above named TRANPORTES MARITIMOS DO ESTADO, has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit to reverse the final decree of this Court, filed and entered on the 9th day of August, 1923, in the office of the Clerk of this Court, and each and every part thereof, and also the interlocutory decree filed and entered in said Clerk's office on the 9th day of June, 1923, and an order of this Court, filed and entered in said Clerk's office on the 13th day of September, 1923, and each and every part of said order.

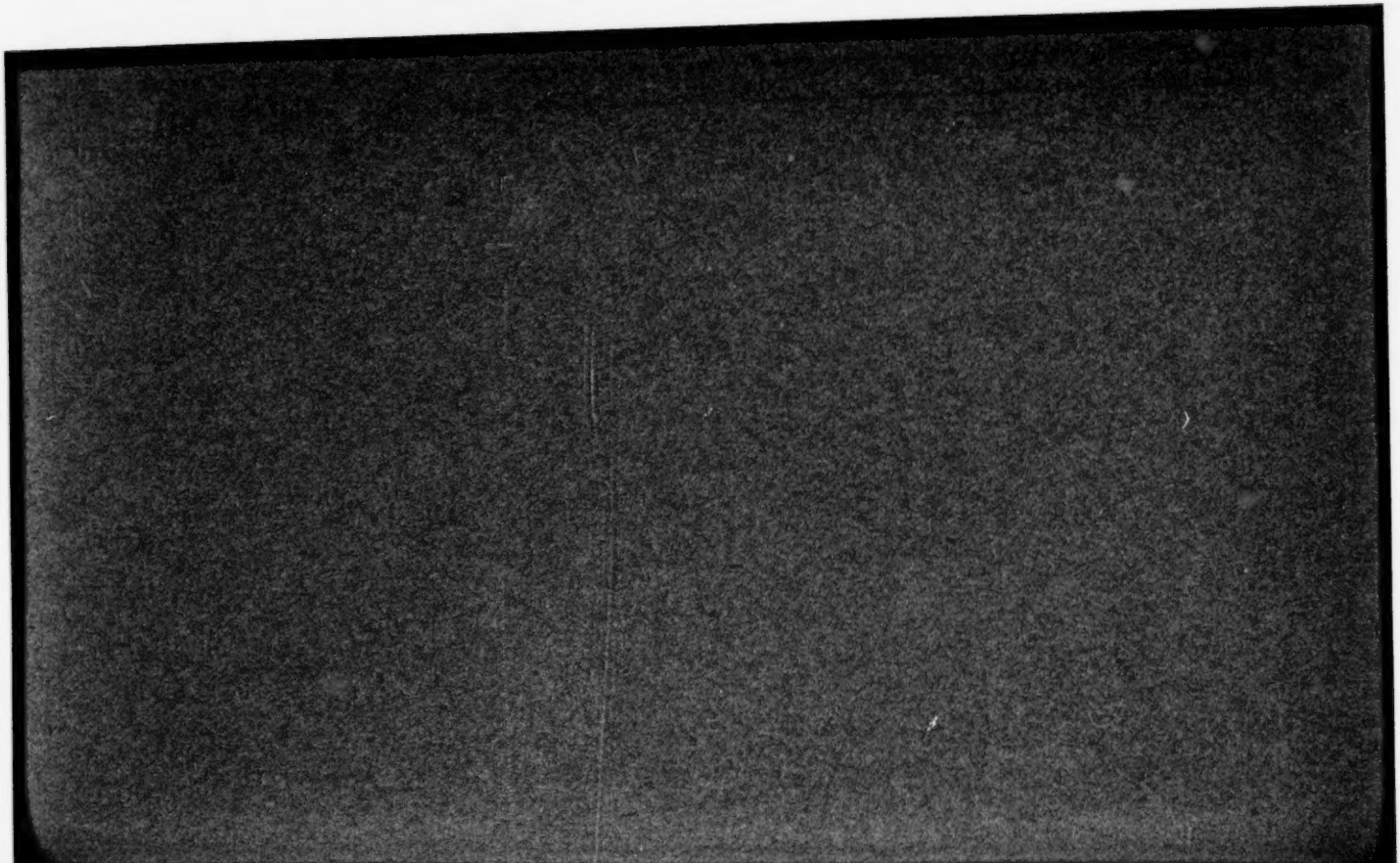
NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the above named Transportes Maritimos Do Estado shall prosecute its appeal to effect and answer all damages and costs if it shall fail to make its plea good, then this Obligation shall be void; otherwise to remain in full force and effect.

(Signed) TRANSPORTES MARITIMOS DO ESTADO,
By: G. D. DUARTE
Consul General of Portugal, L. S.
AMERICAN SURETY COMPANY OF NEW YORK,
By: LEON SEKESON
Resident Vice President.
Attest: JAMES J. LUCY,
Resident Assistant Secretary.

Usual acknowledgments.

See petition, pages 23-25.





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IN THE

Supreme Court of the United States

OCTOBER TERM—1923.

Original No. 26.

Ex Parte

In the Matter

of

THE TRANSPORTES MARITIMOS DO ESTADO, A DEPARTMENT OF THE GOVERNMENT OF THE REPUBLIC OF PORTUGAL, Owner of the Steamship "Sao Vicente", by His Excellency J[illegible] d'Alte, Minister Plenipotentiary and Envoy Extraordinary to the United States of America,

Petitioner.

BRIEF FOR THE REPUBLIC OF PORTUGAL.

Statement of the Case.

Facts.

When the Steamship "Sao Vicente" owned by the Government of the Republic of Portugal, and manned by naval reserve officers and a crew of said government, and employed in the sovereign, uses of said government was in the Port of New York, the Stephen Ransom Dry Dock & Repair Corporation filed a libel *in rem* against said steamship to recover the sum of $13,322.26 for alleged breach of contract for services and mater-

ials furnished to said vessel in or about the month of March, 1921, in New York Harbor. A claim of owner and stipulation for value were filed to release said ship, and an answer was filed as stated in the petition herein (Pet. & Rec., p. 27). The answer set up in explicit terms the sovereignty of the said Republic of Portugal and the sovereign character of the said steamship as the property of said Republic, objected to the exercise of jurisdiction by the District Court over the Transportes Maritimos do Estado, the respondent in said action, which was a part of the said Government of Portugal and therefore sovereign, and over the said steamship, the property of said sovereign. It also asserted the immunity of said Government and said steamship from liability or lien for said alleged services, and averred that the District Court was without jurisdiction to hear and determine the merits of the libel (Pet. & Rec., p. 28). Upon the motion of the libellant the District Court, assuming jurisdiction, directed the entry of a decree against the claimant upon the pleadings (Pet. & Rec., p. 31). The Government of Portugal also filed a suggestion representing that the said steamship "Sao Vicente," was the property of the said sovereign Government of Portugal and employed for sovereign purposes (Pet. & Rec., p. 33). The District Court upon motion struck out the suggestion and exercised jurisdiction over the said Republic of Portugal and its said steamship (Pet. & Rec., p. 48).

The Republic of Portugal denies jurisdiction in the District Court:

1. Because, inasmuch as at the time of the performance of said alleged services and the ar-

rest and seizure of said steamship "Sao Vicente" under process of the said District Court issued upon the filing of said libel, said steamship was a vessel owned by the said Republic of Portugal and employed by her sovereign owner for sovereign purposes, and was immune from liability or lien and from the jurisdiction of the said District Court (Pet. & Rec., pp. 28, 35, 36).

2. Because such proceeding in substance and effect was and is an action against the Republic of Portugal and said Republic of Portugal had not consented to be sued.

POINT I.

The importance of the question.

There are pending in the District Courts of New Jersey and New York several proceedings in admiralty against the ships of said Republic of Portugal, involving many hundreds of thousands of dollars, and many others are likely to be instituted, in every one of which are involved the jurisdictional question here presented. It is urgent and of great public importance that such jurisdictional question now be reviewed and settled by this Court.

POINT II.

Classes of Portuguese Government vessels.

The classes of vessels controlled by the Government of Portugal during and since the war are similar to those controlled by the United States Government. They are: (a) Armed pub-

lic vessels, (b) Unarmed public vessels, (c) Merchant vessels. The "Sao Vicente" belonged to both of these latter (b) and (c) classes. She was one of the former German ships which were in the Harbor of Lisbon when war was declared by Portugal against Germany in the Spring of 1915, which were taken into possession of the Portuguese Government as Government ships and were used by the Portuguese Government both as transports for carrying of Government supplies and troops, and also for carrying of passengers and cargo. All of these vessels were in every sense the public property of the Republic of Portugal. The jurisdictional question now presented relates to vessels of these classes, (b) and (c). Whereas the Government of the United States by legislation has waived its immunity with respect to merchant vessels of class (c), the Government of the Republic of Portugal has not, by legislation or in any other manner, waived its immunity with respect to any of its vessels whether they be used strictly in the naval service or in the merchant service.

POINT III.

There is sufficient proof in the record that the "Sao Vicente" was the public sovereign property of the Republic of Portugal.

1. This fact of public sovereign ownership is admitted for the purposes of this action.

(1) The answer duly filed in this case pleads (Pet. & Rec., p. 28):

> "That the steamship "Sao Vicente" is a Portuguese vessel flying the flag of Portugal, owned and operated by the Transportes

> Maritimos do Estado, which is now and at the times mentioned in the libel, was *a Department of the sovereign foreign Government of Portugal,* a Government now at peace with the United States and allied with the United States in the late World War, and that *said vessel is engaged in the public service of Portugal,* and that the matters set forth in said libel relate to the management, control and operation of said vessel outside the jurisdiction of the United States."

Here is a direct allegation that the Transportes Maritimos do Estado is a department, that is a part of the sovereign Government of Portugal, and that the "Sao Vicente" was *owned* by the Transportes Maritimos do Estado. The whole includes the part. Therefore, if this vessel was owned by a *part of the Government of Portugal,* it follows necessarily that it was owned by that Government, that is, by the Republic of Portugal. There is also a positive averment that this vessel at the time was engaged in the public service of Portugal.

(2) After the filing of this answer the libellant moved for judgment on the pleadings. This motion was granted by the District Court and an order was made directing that the libellant have an interlocutory decree upon the pleadings (Pet. & Rec., p. 31).

(3) It is well settled law that upon a motion for a decree or judgment on the pleadings *all* the allegations in the pleadings must be taken as true. The motion was successful. The decree was granted. This in itself obviated the necessity and *prevented the possibility of further proof of any of the allegations in the answer.* These allegations in the answer of the sovereign owner-

ship of the "Sao Vicente" by the Republic of Portugal, and of her being engaged in a public sovereign use must therefore be taken as true for the purpose of this action. They are thus admitted by the libellant. They are conclusive proof of the Government ownership and sovereign use of this vessel. (*The Seminole*, 42 Fed. 924; *Dennis* v. *Slyfield*, 117 Fed. 474, 54 C. C. A. 520; *The Schuylkill*, 249 Fed. 781; *The Fred E. Sander*, 212 Fed. 545; *Pacific R. Co. of Missouri* v. *Mo. Pac. Ry. Co.*, 111 U. S. 505; *Boyer* v. *Boyer*, 113 U. S. 689, 701.)

This principle is so well settled that it is hardly necessary to cite authorities in support of it. It makes no difference whether the pleading is on information and belief or not. In either case the *truth of the allegations is admitted.*

II. In another action, *Transportes Maritimos do Estado, Plaintiff in Error* v. *Sylvio A. Almeida*, pending in the District Court for the Southern District of New York and now on appeal to this Court, October Term, 1923, No. 265, testimony taken upon a commission to the Portuguese Government was offered and received in evidence, which showed conclusively that the Transportes Maritimos do Estado was not a private corporation but was a department and a part of the sovereign Government of Portugal (pp. 46-55 of Record in said case No. 256, before this Court). If it had not been for the direction by the District Court of an interlocutory decree herein on the pleadings this testimony could likewise have been adduced in this case to prove that the "Sao Vicente" was the public property of the Republic of Portugal.

POINT IV.

The District Court was without jurisdiction.

I. The Transportes Maritimos do Estado being conceded or admitted, as above, to be a part of the Government of the Republic of Portugal, it follows that it, as a part of the Republic of Portugal, so is immune; that it is immune from suit in the United States Courts, as it is well settled that a sovereign cannot be sued in our courts without its consent.

1. The immunity of a foreign sovereign is in no way analogous to that of a domestic sovereign and does not rest upon the same principles. While a domestic sovereign voluntarily may submit to the jurisdiction of its own courts, neither the State nor the Federal Government does or should impose the jurisdiction of its courts upon a foreign sovereign, as by so doing it transgresses the dignity of the foreign sovereign. It is universally recognized by the comity of nations that a foreign sovereign and its property are immune from the jurisdiction of our courts (*The Exchange*, 7 Cranch. 116, 11 U. S. 116; *The Carlo Poma*, 259 Fed. 369; *Briggs* v. *The Light Ships*, 11 Allen, Mass. 157; *The Fidelity*, 9 Ben. 333; *The Maipo*, 259 Fed. 367; *The Roseric*, 254 Fed. 154; *Mason* v. *Intercolonial Ry.*, 197 Mass. 349; *The Davis*, 10 Wall. 15; *Long* v. *The Tampico*, 16 Fed. 491; *The Attualita*, 238 Fed. 909; *The Luigi*, 230 Fed. 493; *The Othello*, 5 Blatchford 342; *The Florence H.*, 248 Fed. 1012).

The most recent case on this subject is the *United States of America, owner of the Steamship Western Maid* v. *The Hon. J. Whitaker Thompson,* 257 U. S. 419. That case was very similar to this case. The libel was filed on November 8, 1919, the ship was arrested under a process *in rem* and, as in this case, *a claim of owner and stipulation for value* were filed by the United States to release the ship, and on April 11, 1921, nearly two years later, the Government moved, on the ground of sovereignty of the owner of the vessel, for leave to file a writ of prohibition which was granted and a rule absolute for the writ was entered.

The cases relied upon by the libellant in support of the jurisdiction of the District Court are those as to the effect of a voluntary appearance in an action in the United States Courts, either of one of the States of the United States or of a territory of the United States, and Mr. Justice Page, in *De Simone* v. *Transportes Maritimos do Estado* in the Appellate Division of the Supreme Court (200 N. Y. App. Div. 82), very ably distinguishing these cases, says (Italics ours):

> "The right of a Court of this country to assume jurisdiction over a cause of action against a foreign sovereign nation, or to seize and impound its property cannot be reasoned from analogy to the right to so treat another State. In *New Hampshire* v. *Louisiana,* and *New York* v. *Louisiana* (108 U. S. 76, 90), it was distinctly held that one State cannot create a controversy with another State by assuming the prosecution of debts owing by

the other State to its citizens. In *United States* v. *Dickelman* (92 U. S. 520, 524), the Court said: 'One nation treats with the citizens of another *only through their Government.* A sovereign can not be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in the performance of his obligations, by treaty or otherwise voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own Government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself.' Alexander Hamilton wrote, 'It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of all mankind' (*The Federalist* No. LXXXI). The leading case in this country on the immunity of a vessel of a foreign sovereignty from seizure, by the courts of the United States in a suit in admiralty is *The Exchange* (7 Cranch. 116) in which the schooner Exchange, owned by American citizens, was seized on the high seas by a French privateer, taken to France and refitted as a vessel of war. Two years

after she *entered an American port**, *and upon libel filed in the United States District Court, by her former owners, was seized by process of the Court.* The libel was dismissed by the District Court, the sentence of the District Court reversed by the Circuit Court and on appeal the sentence of the Circuit Court reversed and that of the District Court affirmed by the Supreme Court of the United States. Mr. Justice Marshall, writing for the Court, held that a public armed vessel of a foreign nation entering the port of a friendly state under the circumstances of that case is not subject to the judicial tribunals of the United States. The same principle was applied by the Court of Appeals Division of the High Court of Justice of England in the case of the *Parlement Belge* (L. R. 5 Prob. Div. 197 in 1880) in proceedings *in rem* to secure redress for loss incurred by a collision instituted against an unarmed mail packet boat belonging to the Government of Belgium, officered and commissioned by that Government and sailing between Dover and Ostend. The Court held that the vessel came within the rule which extends immunity from the jurisdiction of the courts of one country to the public vessels of a foreign nation, *even though incidentally carrying freight and passengers for hire.* The Court cited and quoted from the following cases: *The Exchange* (*supra*); *The Duke of Brunswick* v. *The King of Hanover* (6 Beav. 1, 50); *The Prins Frederick* (2 Dod. 451, 456); *DeHaber* v. *The Queen of Portugal* (17 Q. B. 171); *The Athol* (1 Wm. Rob. 374); *Briggs* v. *The Lightships* (11 Allen [Mass.] 157); *The Marquis of Huntley* (3 Hagg. 246); *The Thomas A. Scott* (10

* As in the case at Bar.

L. J. [N. S.] 726) and *Vavasseur* v. *Krupp* (L. R. 9, Ch. D. 351). The Court then said: 'The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.' The Court then considered the argument that the admiralty suit was a proceeding *in rem* solely against the property, and not a procedure directly or indirectly impleading the owner of the property, and held that a Court which seizes and sells a man's property assumes to make that man subject to its jurisdiction and said (p. 219): '*To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be indirectly impleaded, any more than he could be directly impleaded.* The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court.' These decisions so far as I have been able to discover have never been questioned."

Mr. Justice Holmes, in delivering the opinion of the United States Supreme Court in *Kawananakoa* v. *Polyblank* (205 U. S. 349, 353) said:

> "Some doubts have been expressed as to the source of immunity of a sovereign power from suit without its permission, but the answer has been public property since before the days of Hobbes (*Leviathan*, c. 26, 2). A sovereign is exempt from suit."

II. The steamship "Sao Vicente" as a public vessel, the property of the Republic of Portugal, was immune.

1. It is admitted that the libel in this case relates solely to an alleged claim for services and materials furnished against a public vessel of Portugal engaged in the public service of Portugal (Pet. & Rec., pp. 28, 35, 36). There is nothing in the legal fiction of personification of a vessel, by reason of which its sovereign owner can be held for any such obligation. To conclude that this alleged breach of contract creates a lien liability of the vessels will permit by indirection the recovery of such claims against the Government which otherwise would not be recoverable. There is no distinction between a sovereign Government and its property. Liens cannot be acquired or enforced against public property. There should be no relief by indirection where Congress has not provided relief directly. (*Bibby* v. *United States*, 188 U. S. 400, 408; *Langford* v. *United States*, 101 U. S. 341, 344; *Gibbons* v. *United States*, 8 Wall. 269, 274.)

Where a nation will assume liability and fur-

nish a remedy is wisely reserved for its own determination. We must assume that, at the proper time and as it is requested, diplomatically or otherwise, it will give these claims the consideration they merit. The rights or claims such as alleged in this case are in fact not the subject of jurisdiction of our courts but should be adjusted by negotiations through diplomatic channels between the Governments concerned. Judge Hough in *The Maipo* (249 Fed. 367), very properly says: "that the question is not justiciable but diplomatic." The Government of Portugal has in fact provided for the adjustment of all such claims by creating a Special Commission to which they are to be presented.

2. As the Republic of Portugal is immune from the jurisdiction of our courts, it follows that the steamship "Sao Vicente" was also immune from said jurisdiction. The doctrine of immunity of a sovereign includes immunity on the part of its property from any liability or lien.

Public vessels are part of the sovereign state to which they belong and their liabilities are merged in that of the sovereign state. Under such circumstances, redress must be sought from the sovereign and not from its vessel. The privileges and prerogatives of sovereignty, accorded the sovereign, are impressed upon the sovereign's public property (*United States* v. *Ansonia Brass and Copper Co.*, 218 U. S. 452; *Board of Commissioners* v. *O'Connor*, 86 Ind. 531-537; *Rowley* v. *Conklin*, 89 Minn. 172, 175). There should be no distinction beween the Government and

its property. Such public property is merged in its sovereign, and redress must be sought from the sovereign and not from the instrument used in the exercise of its legitimate functions.

The law passes by the vessel and places the liability, if any, on the sovereign alone, and not upon the property which it employs for its public service. The law is well stated by former Chief Justice Waite, then sitting on the Circuit Bench for the Southern District of New York, in the "*Fidelity*" (16 Blatch. 569, 572, 573; 8 Fed. cases, 47, 58), where he says (Italics ours):

> "A careful examination of the cases satisfies me that the exemption of public vessels from suits in admiralty arises not out of a want of power to sue the public owner, but *out of a want of liability on the part of the vessel.* A public vessel is part of the sovereignty to which she belongs and her liability is merged in that of the sovereign. Under such circumstances redress must be sought from the sovereign and not from the instruments he uses in the exercise of his legitimate functions. Public creditors *look to the public faith, for their security and not to the public property.* But it is insisted that during the public ownership the maritime liability of the vessel may be incurred, although the remedy in admiralty is suspended. If this be so, the seamen employed on vessels of war, if their wages are not paid and their vessel is sold to private owners, to be employed in the ordinary business of commerce, may libel the vessel in the hands of her private owners to secure their money. A simple statement of such a proposition is all that is required to show its fallacy. *The real*

truth is that in such cases the maritime law passes by the thing and places the liability on the sovereign owner alone and not upon the maritime instrumentalities of his sovereignty. The cases of *The Davis* (10 Wall. 77 U. S. 15) and *The Siren* (7 Wall. 74 U. S. 152) are not at all in conflict with this."

The argument of the King's advocate in the case of the *Prins Frederick* (2 Dods. 451), is sound. To conclude that a claim such as that alleged in the libel herein creates a lien liability of the vessel, will permit, by indirection, the assertio nof suc hclaims against a sovereign Government which otherwise could not be enforced against such Government. It is well settled that a sovereign Government cannot be sued in a United States court without its consent, nor can it be compelled to submit to jurisdiction of said court by the necessity of defending its property from attack by legal process (*Beers* v. *Arkansas,* 20 How. 527).

3. The fiction of the personification of a vessel which makes it responsible for its acts and which may give a claimant a right *in rem* against her does not apply to a public vessel which is the property of a sovereign Government. Commercial vessels are sent to all ports. The necessities of the vessel's operation demand that the vessel, the *res,* shall be responsible for her torts and contracts. Her personification accomplishes this. The basis of the laws governing merchant vessels is in aid of commerce, but should not be applied to personify or hypothecate a Government's vessels. The subjects of any nation

through the happening of any events should not secure a proprietary interest in a vessel of a sovereign Government or thus become co-owners with the sovereign. The rule of reason is that a Government vessel has her identity merged in her sovereign.

The United States Supreme Court, in its opinion delivered June 1, 1921, in *Ex parte in the Matter of the State of New York, Edward S. Walsh, Superintendent,* etc., No. 25 Original October Term, 1920 (256 U. S. 490), denies that "the uniform operation and effect of the characteristic principles and the rules of the maritime law as a body" can impose itself upon and overrule the privileges and prerogatives which belong to the sovereign. As the Court there says:

> "It is not inconsistent in principles to accord to the State, which enjoys the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction."

As there can be no distinction between the Government and its property devoted to public use, vessels or property of a sovereign, devoted to public uses, which are exempt from lien liability or suit, in all other tribunals are and should be exempt in the courts of admiralty and maritime jurisdiction. The fiction of the admiralty law which personifies commercial vessels cannot personify public vessels, and impose upon them liabilities which are inconsistent with the privileges and prerogatives of sovereignty.

4. The sovereign immunity of a vessel includes immunity from all lien liability, and also from process. *In re Hussein Bey*, 256 U. S. 616; *Ex parte, in the Matter of the State of New York*, Nos. 25, 26, Original, October Term, 1920, 256 U. S. 490, 503). The cases which have permitted actions for salvage and general average contribution, to be enforced against Government property, not in its possession nor devoted to public use, are not in point upon questions here in issue (*The Davis*, 10 Wall. 15; *Long* v. *Tampico*, 16 Fed. 491; *The Johnson Lighterage Co.*, 231 Fed. 365). A maritime lien may not exist in a cause when the thing alleged to be responsible was not the subject of a maritime lien (*The Rock Island Bridge*, 6 Wall. 213). If the doctrine of immunity includes immunity from liability, as well as process, Government vessels devoted to public service can not be the subject of liens (*Riddock* v. *State*, 123 Pac. Rep. 450, 452, and cases there cited; Laski's *"The Responsibility of the State in England,"* 32 Harvard Law Review, 447). The prerogatives of sovereignty include immunity from liability, as well as immunity from process (*The Western Maid*, 257 U. S. 419).

In the *Western Maid (supra)*, Mr. Justice Holmes in making absolute a writ of prohibition, said (Italics ours):

> "The United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort. * * * It may be said that the persons who actually did the act complained of may or might

be sued and that the ship for this purpose is regarded as a person. But that is a fiction not a fact and as a fiction, is the creation of the law. It would be a strange thing if the law created a fiction to accomplish the result supposed. It is totally immaterial that in dealing with private wrongs the fiction, however originated, is in force. See *Liverpool, Brazil & River Plate Steam Navigation Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48, 53. The personality of a public vessel is merged in that of the sovereign. *The Fidelity*, 16 Blatchford 569, 573. *In re State of New York—The Queen City*, June 1, 1921.

But it is said that the decisions have recognized that an obligation is created in the case before us. Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp. The leading authority relied upon is *The Siren*, 7 Wall. 152. The ground of that decision was that when the United States came into court to enforce a claim it would be assumed to submit to just claims of third persons in respect of the same subject matter. *Carr* v. *United States*, 98 U. S. 433, 438. In reaching its result the Court spoke of such claims as unenforcible liens, but that was little more than a mode of expressing the consent of the sovereign power to see full justice done in such circumstances. It would have been just as effective and more accurate to speak of the claims as ethical only, but recognized in the interest of justice when the sovereign came into court. They were treated in this way by Dr. Lushington in *The Athol*, 1 Wm. Rob. 374, 382. Further distinctions have been taken that need not

be adverted to here. There was nothing decided in *Workman* v. *New York*, 175 U. S. 552, that is contrary to our conclusion, which, on the other hand, is favored by *The Fidelity*, 16 Blatchf. 169, 573, and *In re State of New York, Walsh, petitioner*, and *In re State of New York The Queen City*, June 1, 1921. *The last cited decisions also show that a prohibition may be granted in a case like this.* See *The Ira M. Hedges*, 248 U. S. 264, 270."

5. The decision of the United States Supreme Court in the *Western Maid (supra)*, effectually disposed of the case *The Siren* (7 Wall. 152) and *Workman* v. *City of New York* (179 U. S. 552), as far as they may be thought to be in conflict with the principles here maintained. In fact, however, they are in support of the claim for immunity asserted in this case. In *The Siren*, the Court said:

> "It is a familiar doctrine of the common law, that the sovereign can not be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the Government. The exemption from direct suit is therefore without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They can not be subjected to legal proceedings at law or in equity

without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this Court in *United States* v. *Clarke*, 8 Pet. 444.

The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned Judge who tried this case, there is no distinction between suits against the Government directly and suits against its property. * * *

For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, can not be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the Government, incapable of enforcement without its consent, and unavailable for any purpose."

POINT V.

The immunity of the "Sao Vicente" as a public vessel owned by the Sovereign Government of Portugal was not affected by her having carried commercial cargo.

The fact that upon the voyage during which the "Sao Vicente" was in this country and was arrested and seized in this suit, she had carried

commercial cargo, does not affect her immunity from the jurisdiction of the United States Courts. The immunity of a vessel is based upon her character as the property of the sovereign. It does not depend upon the use to which she is put. The fact that she may have been carrying cargo is immaterial (*The Pampa,* 245 Fed. 137; *The Carlo Poma,* 259 Fed. 369; *The Maipo,* 252 *Fed.* 627, 259 Fed. 367; *Briggs* v. *The Light Ships,* 11 Allen, Mass. 157; *The Parlement Belge,* L. R. 5, P. D. 197; *The Porto Alexandre* (1920), P. 30; *The Scotia* (1903), A. C. 501; *The Jassy* (1906), P. 270; *The Constitution,* L. R. 4, P. D. 39). *The Maipo (supra)* is directly in point upon this question. In this case a naval transport of Chili carried a commercial cargo on a voyage to this country to obtain a cargo for the Chilian Government, and it was held that the vessel was immune although engaged in a commercial enterprise. The case came before the Court a second time and Judge Hough then said to the same effect (259 Fed. 367) (Italics ours):

> "Why was a war vessel exempt from seizure? Not because it was a war vessel, but because it was a *part of the exercise or manifestation of sovereign power* and why is any other vessel exempt? Why may any other piece of property be exempt? *For the same reason,* just as the sovereign himself is exempt. Now, it may be the opinion of counsel, as it assuredly is my opinion, that when a sovereign republic, empire or whatnot, goes into business and engages in the carrying trade, it ought to be subject to the liabilities of carriers just as much as any private person, but I think it must be plain that if I, in my official capacity, were to assert that

view and enforce it, I would be assuming (in this case), as one of the humbler officers of the Government of the United States, to define for the Republic of Chili what that Republic should consider to be a governmental function. If the Republic of Chili considers it a governmental function to go into the carrying of trade, as would appear to be the case here, that is the business of the Republic of Chili; and if we do not approve it, if we do not like it, if we do not wish any longer to accord that respect to the property so engaged, which has hitherto been accorded to Government property, *then we must say so through diplomatic channels, and not through the judiciary.* Otherwise, the judiciary are really contributing to what might become, under conceivable circumstances, a *Casus belli.* Therefore I feel, not only because there is no distinction between this case and the previous decision in the *Maipo* case, but for the greater reason that *the question is not justiciable, but diplomatic,* that the motion must be granted, however hard it may be upon the private persons; and I do think it is very hard. An order may be submitted to the effect that it appearing to the Court, upon the return of the order to show cause herein, that the process in this case having been inadvertently issued, in the sense that it was issued without knowledge of the facts now before the Court, such process is set aside, upon the ground that *the Court is without jurisdiction to proceed by process in rem against the steamship Maipo, because the same is the property of and a portion of the sovereignty of the Republic of Chili, a country with which the Government of the United States of America is on terms of peace and amity.*"

POINT VI.

The immunity of the "Sao Vicente" and its owner was not waived.

I. There was certainly no express waiver of jurisdiction.

1. In this case the answer protested against the jurisdiction of the Court and set up distinctly the plea of immunity. A voluntary appearance and answer waives objection to jurisdiction only in cases where the Court would acquire jurisdiction of the person if the process had been properly executed within its jurisdiction. If, however, the person sued *is immune from suit* so that the Court could not so acquire jurisdiction of his person, a general appearance and answer in which there is a protest against the exercise of jurisdiction and a plea of lack of jurisdiction does *not* waive this defense. The question here is not one of such a jurisdiction of the person. The plea herein is not alone to the jurisdiction of the person but to the subject matter of the action. Although this action is apparently to recover for services rendered, of which subject-matter the Court would ordinarily have jurisdiction, it is really for services rendered to a foreign sovereign, of which the Court cannot have jurisdiction *without the consent of the sovereign.* The subject-matter of the action is sovereign property, and over this subject-matter the Court has no jurisdiction. The question is here thus, the power of the Court over the respondent and its property. In such

a case an appearance and answer cannot confer jurisdiction, for it is well settled that the question of jurisdiction can be raised *at any time by the parties or by the Court itself* (*De Simone* v. *Transportes Maritimos do Estado,* 200 N. Y. App. Div. 82; *Bradbury* v. *Waukegan & W. Mining & Smelting Co.,* 113 Ill. App. 600; *Persons* v. *Fidelity & Casualty Co.,* 92 Fed. 965; *Persons* v. *Standard Life & Accident Ins. Co.,* 92 Fed. 1922; *Chicago Union Traction Co.* v. *City of Chicago,* 70 N. E. 659; *Loomis* v. *Wadhams,* 74 Mass. 557; *Evansville Grain Co.* v. *Machler,* 88 Mo. App. 186; *Butterick* v. *Richardson,* 64 Pac. 390, 39 Ore. 246; *Lewisburg Bridge Co.* v. *Union Co.,* 232 Pa. 255; *Reid* v. *Reid,* 72 Misc. (N. Y.) 214; *Rigney* v. *Rigney,* 127 N. Y. 408; *Wheelock* v. *Lee,* 74 N. Y. 495; *State of Rhode Island* v. *State of Massachusetts,* 12 Peters 657; *Carr* v. *United States,* 98 U. S. 432; *Dickerhoff* v. *Adler,* 12 Misc. 445; *Meyer* v. *American Locomotive Co.,* 201 N. Y. 163; *Landers* v. *Staten Island R. R. Co.,* 53 N. Y. 450.)

2. It is also perfectly proper to raise this question of jurisdiction by an answer to the libel, and a denial of the allegations in the answer or pleading other defense does not affect the question or constitute a waiver (*Rhode Island* v. *Massachusetts,* 12 Peters 657; *Knight* v. *Bucer,* 6 Ohio Dec. 28; *Hulburt* v. *Palmer,* 39 Neb. 158; *Christian* v. *Williams,* 35 Mo. App. 297; *The Luigi,* 230 Fed. 493; *Kingdom of Roumania* v. *Guaranty Trust Co.,* 250 Fed. 341; *Porto Rico* v. *Rosaly,* 227 U. S. 270; *Porto Rico* v. *Ramos,* 232 U. S. 627).

In *Rhode Island* v. *Massachusetts,* 12 Peters 657, the Court said at page 720 (Italics ours):

> "When the objection goes to the power of the Court over the parties or the subject-matter, the defendant need not, for he cannot give the plaintiff a better writ or bill. Where no inferior Court can have jurisdiction of a case in court or equity the ground of the objection is not taken by plea in abatement as an exception of the given case from the otherwise general jurisdiction of the Court; *appearance does not cure the defect of judicial power and it may be relied on by plea, answer, demurrer or at the trial or hearing* unless it goes to the manner of bringing the defendant into court."

Therefore, this appellant could properly rely upon its answer and the defense of immunity and objection to jurisdiction which they contained. In fact, it is a universally recognized principle that a foreign sovereign is entirely and completely immune from the process and jurisdiction of our courts. This includes judgments as well as other processes. It follows, therefore, that this objection can be first raised at any time.

3. The filing of a bond and stipulation, moreover, cannot be regarded as a waiver of objection to jurisdiction. The filing of a claim of owner and stipulation in this case certainly would have no more force and effect as a waiver than a filing of an appearance or answer. No officer or agent of the sovereign can by *any act* waive sovereign immunity to suit without the specific legislative authority of the sovereign, accompanied by its express consent to submit to the jurisdiction of the Court, and as this authority and consent were wholly lacking in this

case, the filing of a claim and stipulation cannot operate as a waiver. It has been shown that our courts cannot thus force an independent foreign sovereign to go into court and submit to its jurisdiction by attacking its property or thus compel it to waive its immunity or objections to the Courts' jurisdiction (*The Exchange*, 7 Cranch. 116; *The United States of America, owner of the steamship Western Maid, petitioner*, 257 U. S. 419, decided in the United States Supreme Court, January 3, 1922).

In the very recent case in the United States District Court for the Southern District of New York *The Oliver American Trading Co., Inc.*, v. *The Government of the United States of Mexico*, decided October 11, 1923 (New York Law Journal, Vol. 70, No. 15, page 209), where there was a general appearance of the defendant, that Court, which upheld its jurisdiction in the case at Bar, sustaining the sovereign immunity of the Republic of Mexico upon a motion to dismiss on the ground of that immunity, said (Italics ours):

> "The only remaining obstacle in granting the relief asked by the defendants is the contention that jurisdiction has been acquired through a general appearance herein upon the part of their attorneys. Without detailing the reservations made by such attorneys * * * their clear intendment, when fairly construed, is that the appearance was special and designed to raise the question of immunity presented by their motions. *Even upon the questions of appearance the Court is more concerned with substance than with form.*"

In this case last cited this District Court practically overruled its decision in the case now

before this Court upon the petition herein for a writ of prohibition.

II. There can be no waiver by a sovereign of objection to jurisdiction or consent to such jurisdiction *by implication.*

1. There can be no implied waiver by a sovereign. The sovereign's submission to the jurisdiction of our courts must be by its own *express* consent, by the act of its Legislature or by an equivalent sovereign act of the Government itself (*Carr* v. *United States,* 98 U. S. 432; *People of the State of New York* v. *Dennison,* 84 N. Y. 272; *Valarino* v. *Thompson,* 7 N. Y. 576; *Hassard* v. *Mexico,* 46 A. D. 623, 29 Misc. 511; *United States* v. *Eckford's Exrs.,* 6 Wall. 484; *The Exchange,* 7 Cranch. 166, 117; *The Siren,* 7 Wall. 152, 154; *Stanley* v. *Schwalby,* 147 U. S. 508; *Republic of France* v. *Pittsburg Steel Export Co., etc.,* 112 Misc. (N. Y.) 688; *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239). It must be conceded from the answer that this consent is lacking in this case.

2. The waiver of the sovereign's immunity or objection to jurisdiction of our courts or its submission to such jurisdiction cannot be implied or inferred from any act of any agent or subordinate official of the sovereign. No act of an agent or representative of the sovereign as in these cases can be interpreted or operative as such a waiver or consent. The consent must be by the sovereign itself by the act of its legislature or executive or other equivalent sovereign act.

The case of *United States* v. *New York and Oriental S. S. Co., Limited* (216 Fed. 61, 63), holds

that the sovereign, in this case the United States, cannot be sued without its consent and that its consent to be sued must be evidenced by an Act of Congress, and cites *Stanley* v. *Schwalby* (162 U. S. 255), and further it holds that government officers cannot waive the government's privilege in this respect and that their consent that such a suit should be brought cannot bind the Government of the United States (*Carr* v. *United States*, 98 U. S. 432).

III. The cases, relied upon by the libellant do not support this principle of claim of waiver of a sovereign by a general appearance.

1. In the case of the *Luigi* (230 Fed. 493), the vessel was a privately owned vessel, held under requisition or charter by the sovereign, and the owner filed a claim of owner and bond. The Court allowed the attachment to stand, not on the ground of waiver of objection to jurisdiction by the sovereign, but only on the ground that the *private owner had intervened* and that therefore the rights of the sovereign could no longer be affected.

2. Other cases relied upon by the libellant and the District Court as in favor of this principle are *Clark* v. *Barnard*, 108 U. S. 437; *Gunter* v. *Atlantic Coast Line R. R. Co.*, 200 U. S. 273, 289; *Porto Rico* v. *Ramos*, 232 U. S. 627; *Richardson* v. *Fajardo Sugar Co.*, 241 U. S. 44; and *Vesta et al.* v. *Fortuna Estates*, 240 Fed. 256, 262. In all these cases the question arose as to the effect of a voluntary appearance in an action in the United States Courts of either one of the states of the

United States or of Porto Rico, a territory of the United States (see *Kopel* v. *Brigham*, 211 U. S. 468, 476). They involve chiefly questions of the sovereignty of a state or territory as a part of the United States. None of them touch upon the questions of the jurisdiction of our Courts over an independent foreign sovereign or of a waiver by such a sovereign. The sovereignty of a state of the Union is very different from that of a foreign government. There is nothing analogous in the immunity of one to that of the other. A state of the Union is not an independent sovereignty either in relation to foreign governments or to another state and the right of a court of this country to assume jurisdiction over a foreign sovereign or to seize its property cannot be reasoned from analogy to the right to so treat another state.

3. In the *Western Maid*, 257 U. S. 419, there was a general appearance by the Government and the writ of prohibition was made absolute.

POINT VII.

The action in this case in substance and effect is an action against the Republic of Portugal.

1. The Libel while filed *in rem* against the "Sao Vicente" in substance and effect, begins an action against the Republic of Portugal and presents a claim for an alleged breach of contract. For such liability the Government of Portugal did not consent to be sued. There is no distinction

between suits against the Republic of Portugal and suits against its property. Suits against the property of the Republic of Portugal are in effect suits against the Republic of Portugal (*Stanley* v. *Schwalby,* 147 U. S. 408, 512). The Government of the Republic of Portugal is an indispensable party to any proceeding *in rem* in which its public vessels are sought to be subjected to the payment of any obligations (*Christian* v. *The Atlantic & North Carolina Railroad Co.,* 136 U. S. 233, 241). This theory upon which the District Court assumed jurisdiction is untenable.

2. In any suit *in rem* against a vessel the owner and not the vessel must in fact, if not in theory, respond. The judgment or decree is satisfied by the owner or out of his property. The real truth is that the vessel is merged in its sovereign and in actions *in rem* against sovereign owned vessels, the maritime law passes by the thing and places the liability on the sovereign owner alone (*The Fidelity,* 16 Blatch. 659, 572, 573; the *Western Maid,* 257 U. S. 419). In view of this fact it seems impossible to argue that an action against a sovereign vessel such as the "Sao Vicente" *in rem* is, merely because it is *in rem,* not an action against the sovereign owner, the Portuguese Government.

Although it is certainly true that a suit against a vessel is not a suit against the government whose flag it flies, still if the merchant vessel is owned by the government whose flag it flies, then a suit against that vessel *in rem,* even though it should be a merchant vessel, is a suit against that government (the *Maipo,* 259 Fed. 367; the *Western Maid,* 257 U. S. 419).

POINT VIII.

The procedure adopted by the Republic of Portugal in the District Court was proper.

Process was issued against the "Sao Vicente" and, under the writ, the Marshal took physical custody of the vessel on April 14, 1921 (Pet. & Rec., p. 20a). Then without admitting the jurisdiction of the Court, the Transportes Maritimos do Estado, a part of the government of Portugal, made claim for the vessel (Pet. & Rec., p. 18), and furnished a stipulation for the release of the "Sao Vicente" (Pet. & Rec., p. 21). This claim of owner (Pet. & Rec., p. 18) names the Transportes Maritimos do Estado, as owner and claimant of the vessel and it and the stipulation are signed by the Transportes Maritimos do Estado, that is, as we have shown, by a department of, and therefore by, the Government of Portugal.

The Transportes Maritimos do Estado, and therefore, as stated, the said sovereign Government of Portugal, then on May 31, 1921, filed its answer in which it set up the ownership of the vessel by the Transportes Maritimos do Estado as a part of the Government of Portugal and its immunity and objected to the jurisdiction of the District Court (Pet. & Rec., p. 27). This was a perfectly proper method of setting up its immunity and the want of jurisdiction of the Court (*Knight* v. *Bucer*, 6 Ohio Dec. 28; *Hulbert* v. *Palmer*, 39 Neb. 158; *Christian* v. *Williams*, 35 Mo. App. 297; the *Kingdom of Roumania* v. *Guaranty Trust Co.*, 258 Fed. 341; *Rhode Island* v. *Massachusetts*, 12

Peters 657). An interlocutory decree was then on a motion directed in favor of the libellant on the pleadings (Pet. & Rec., p. 31) and the Republic of Portugal then on July 5th, 1921, filed its suggestion of want of jurisdiction by its duly accredited Minister Plenipotentiary and Envoy Extraordinary (Pet. & Rec., p. 33). No traverse to the suggestion was filed but on a motion, the suggestion was, stricken from the record and the final decree was entered against the steamship "Sao Vicente" the property of this petitioner (Pet. & Rec., p. 46). This procedure on the part of this petitioner was proper (*ex parte in re the State of New York, et al.*, 256 U. S. 490, 503; *The Adriatic*, 238 Fed. 902; *The Maipo*, 252 Fed. 627; *The Reseric*, 254 Fed. 154; *The Rogday*, 279 Fed. 130).

POINT IX.

The District Court has clearly exceeded its jurisdiction in this case.

1. The trial Court exceeded its jurisdiction, as we have conclusively shown, in failing to dismiss the libel as against the property of a sovereign state and in directing a decree in favor of the libellant against the sovereign (Pet. & Rec., p. 31).

In the *Kingdom of Roumania* v. *Guaranty Trust Co.* (250 Fed. 341), the Court said, "It is *long accepted law* that a foreign sovereign cannot be sued nor his property attached in the Courts of a foreign friendly country *without his consent,*" and in *Smith* v. *Reeves,* 178 U. S. 436, Mr. Justice Harlan said: "The suability of a state without its

consent is a thing unknown to the law." The District Court not only assumed jurisdiction over the claimant in this case, a foreign sovereign, where it is indisputably the law that it had no jurisdiction and could not acquire jurisdiction without the consent of that foreign sovereign (*Beers* v. *Arkansas*, 20 Hun 527; *The Siren*, 7 Wall., 152, 154; *The Exchange*, 11 U. S. 116; *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341), but after so assuming jurisdiction where it should not have done so it denied to the claimant its right to appeal to the Supreme Court (Pet. & Rec., p. 53) although that right is an absolute right and its allowance is not in the discretion of the District Court (*Southern Building and Loan Ass'n* v. *Carey*, 117 Fed. 325, 327; *U. S.* v. *Adams*, 6 Wall. 752, *Ex parte The So. & No. Ala. R. R. Co.*, 95 U. S. 221; *The Duoro*, 3 Wall. 564), and has been directly provided for by this Court in *U. S.* v. *John*, 155 U. S. 109.

Thus the Court below without right or authority, assumed a jurisdiction which it did not and could not have and *had no jurisdiction to assume* and improperly refused to permit its improper assumption of and *excess* of jurisdiction to be questioned or reviewed by the Supreme Court.

2. In *U. S.* v. *John*, 155 U. S. 109, this Court says:

> "If the question of jurisdiction is in issue, and the jurisdiction sustained, and the judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified, and come directly to this Court,

> or to carry the whole case to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that Court."

In this case the claimant did elect to come directly to this Court, but the trial Judge, although Section 238 provides that the question of jurisdiction "shall be certified," in any case in which the jurisdiction of the Court is in issue, refused to satisfy the question and the Court, although such certification was not necessary, as the question of jurisdiction alone was in issue on the appeal (*Re Lehigh Mining & Manufacturing Co.*, 156 U. S. 322; *McAllister* v. *Chesapeake & Ohio Rwy. Co.*, 243 U. S. 302), refused to allow the appeal direct to this Court (Pet. & Rec., p. 53). The claimant then upon the suggestion of a judge of the Circuit Court of Appeals appealed to that Court, as provided above, with a view to having the question certified by it to this Court, but that appeal was dismissed with a *penalty* of an addition of five per cent. of the amount of the judgment, under the erroneous view that the question of jurisdiction had been decided by this Court in *Tietjen & Lang Dry Dock Co.* v. *The Steamship Sao Vicente* and two other cases in 260 U. S. 151. In those cases this question of jurisdiction was not decided by this Court. It was not even considered. The writs of certiorari were dismissed upon other and technical grounds, namely, that the Consul General who had petitioned for the writs was not competent to appear for his government and make the claim of immunity.

3. Thus the Court below having, without right or authority, assumed jurisdiction which it could not assume and having improperly refused to per-

mit its assumption of and excess of jurisdiction to be reviewed by this Court, the only course open to this claimant to preserve its rights under the law and comity of nations as a friendly sovereign, is by this petition for a writ of prohibition, which is peculiarly the proper remedy where the lower Court has thus exceeded its authority (*Detroit River Ferry Co.*, 104 U. S. 519; *Re Gordon*, 104 U. S. 515; *Smith* v. *Whitney*, 116 U. S. 167).

POINT X.

The remedy by writ of prohibition is proper.

1. The propriety of the application is definitely settled (*Judicial Code*, Sec. 234; *The Western Maid*, 257 U. S. 419; *United States* v. *Peters*, 3 Dallas, 121; *In re Baiz*, 135 U. S. 403; *ex parte Indiana Transportation Co.*, 244 U. S. 456; *In re Metropolitan Trust Co.*, 218 U. S. 312).

The most recent opinion on this subject is the *United States of America*, owner of the steamship *Western Maid* v. *The Hon. J. Whitaker Thompson*, 257 U. S. 419. The case was very closely in point with the case at bar. In that case the libel was filed on November 8, 1919, the ship was arrested under a process *in rem* and a claim of owner and stipulation for value were filed by the United States to release the ship, and on April 11, 1921, nearly two years later the government moved, on the ground of the sovereignty of the owner of the vessel for leave to file a writ of prohibition which was granted and a rule absolute for the

writ was entered. In the opinion Mr. Justice Holmes, said, citing *In re State of New York, Welsh, petitioner,* and *In re State of New York, the Queen City,* June 1, 1921 (256 U. S. 490 and 503):

> "The [illegible]ited decisions also show that a prohibition may be granted in a case like this. See *The Ira M. Hedges,* 248 U. S. 264, 270."

In ex parte, In re State of New York, Walsh, petitioner, 256 U. S. 490, cited above by Mr. Justice Holmes, this Court said:

> "The power to issue writs of prohibition to the District Courts when proceeding as courts of admiralty and maritime jurisdiction is specifically conferred upon this Court by Section 234, Judicial Code (Act of March 3, 1911, ch. 231, 36 Stat. 1087, 1156). And the fact that the objection to the jurisdiction of the Court below might be raised by an appeal from the final decree is not in all cases a valid objection to the issuance of a prohibition at the outset, where a court of admiralty assumes to take cognizance of matters over which it has no lawful jurisdiction (*In re Cooper,* 143 U. S. 472, 495). * * *
>
> The *want of authority* in the District Court to entertain these proceedings in *personam* under rule 59 (now 56) brought by the claimants against Mr. Walsh as Superintendent of Public Works of the State of New York *is so clear,* and the fact that the proceedings are in essence suits against the State without its consent is so evident, that instead of permitting them to run their slow course to final decree, with inevitably futile result, the writ of prohibition, should

be issued as prayed (*ex parte Simmons*, 247 U. S. 231, 239; *ex parte Peterson*, 253 U. S. 300, 305)."

Just as the United States is a sovereign so also the Republic of Portugal is sovereign and therefore the same rules and principles of law as apply to one apply to the other. Just as the United States as sovereign cannot be sued without its consent so also the Republic of Portugal should not be sued without its consent. The Republic of Portugal has not given its consent. This action is in substance and effect a suit against the Republic of Portugal. It is a suit against a department or an integral part of the government of that Republic. The District Court was therefore in the beginning and ever since has been without jurisdiction to proceed against the "Sao Vicente" or against the Republic which owned her. The District Court was and is without jurisdiction of the person, or property of the sovereign or of the subject matter of the action.

This application for this writ is timely as it is well settled that the question of jurisdiction can be raised at any time in an action by the parties or by the Court itself, and it is particularly appropriate where the lower Court has exceeded its jurisdiction as in this case.

POINT XI.

The Writ of Prohibition should be granted and made absolute.

1. Since the libellant by its pleading, as we have shown has actually admitted that the re-

spondent is a foreign sovereign, that the vessel involved in the action is the property of that sovereign, and thus that the said sovereign and its property were immune from the process of our courts, none of the United States Courts had, nor could it assume jurisdiction in this case either over the subject matter of this action or the person of the respondent, and this Court may take judicial notice of this fact and of this exceeding of jurisdiction by the Court below, and of its own motion reverse the decree herein or direct the dismissal of this action. All other questions, including any question of practice or proceedings in bringing this matter before this Court, need not be considered. This Court should therefore grant the writ of prohibition prayed for. Otherwise, the libellant would have the benefit of the decree of the District Court though rendered by a Court which had no authority to hear and determine the matter in controversy in this action.

2. It cannot be claimed that the question of jurisdiction was improperly raised or not raised in due time. This is an admiralty action and it is well settled that in admiralty suits the entire question may be taken up, *de novo* by the higher Court; in fact, that new evidence can be submitted by either party, and that the proceeding may be practically a trial of the issues *de novo* by the higher Court. It is clear, therefore, that any question of facts bearing upon the jurisdiction of the Court can properly be considered by this Court upon this petition for a writ of prohibition even though presented for the first time upon the hearing upon this petition for said writ, and that the suggestion of the Minister of the Re-

public of Portugal, even if stricken from the record by the lower Court, can properly be considered by this Court.

3. After all, the only question is whether or not the "Sào Vicente" was a publicly owned vessel belonging to a sovereign government. This for the purposes of this action is admitted and this admission is conclusive. Since this is true it was immune and the District Court was and is without jurisdiction. Of this fact this Court may take judicial notice regardless of how the fact is placed before it. The suggestion of the Minister of Portugal was properly before this Court. However, whether or not the suggestion of the Minister of Portugal came direct from the Minister or through an official of our government, or in fact, whether such suggestion was filed at all, is immaterial. It is sufficient that the facts upon which the immunity is based are raised in the answer and admitted as stated and that as so admitted they are before this Court. The District Court being thus shown to have been without jurisdiction, this Court can and properly should take judicial notice of the fact and grant this writ of prohibition (*Mansfield, etc., R. Co.* v. *Swan*, 111 U. S. 379, 382; *King Iron Bridge, etc., Co.* v. *Otto County*, 120 U. S. 225; *Cameron* v. *Hodges*, 127 U. S. 322, 326; *Metcalf* v. *Watertown*, 128 U S. 586, 587; *Continental National Bank* v. *Buford*, 191 U. S. 129; *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 453; *Louisville, etc., R. Co.*, v. *Motley*, 211 U. S. 149; *Caperon* v. *Van Norden*, 2 Cranch, 126; *Jackson* v. *Ashton*, 8 Peters, 148; *Dred Scott Case*, 19 How. 393, 400;

Bors v. *Preston*, 111 U. S. 252; *Williams* v. *Nottawa*, 104 U. S. 209; *United States* v. *Huckabee*, 16 Wall. 414).

POINT XII.

Conclusion.

The want of authority in the District Court to entertain this proceeding *in rem* against the "Sao Vicente" or to assume jurisdiction over the subject matter of the libel is so evident that it is respectfully submitted that the writ of prohibition should issue as prayed. The relation of this case to the other cases pending against this petitioner involving the same substantial questions and large sums of money justifies that the questions herein submitted to this Court shall be fully determined, and particularly so as such a decision in favor of this petitioner can be reached without injustice to the libellant or any persons having claims against this sovereign petitioner, and as this petitioner has made adequate provision for the proper consideration of all just claims of the character of that involved in this action.

New York, November 15th, 1923.

Respectfully submitted,

F. DUDLEY KOHLER,
Proctor for Claimant.

Office Supreme Court, U.
FILED
JAN 7 1924
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1923.
No. [illegible] ORIGINAL.

IN THE MATTER
OF

Transportes Maritimos do Estado, owner of the S. S. "Sao Vicente"

upon

The Application of the REPUBLIC OF PORTUGAL by His Excellency Jose d'Alte, Its Minister Plenipotentiary and Envoy Extraordinary to the United States of America for a Writ of Prohibition and/or Mandamus,

Petitioner,

against

HON. WILLIAM BONDY AND HON. FRANCIS A. WINSLOW, Judges of the District Court of the United States for the Southern District of New York,

Respondents.

BRIEF ON BEHALF OF THE HON. WILLIAM BONDY AND HON. FRANCIS A. WINSLOW, AND OF THE OTHER JUDGES AND OFFICERS OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

E. CURTIS BOWEN,
Counsel for Respondents,
32 Broad Street,
Borough of Manhattan,
City of New York.

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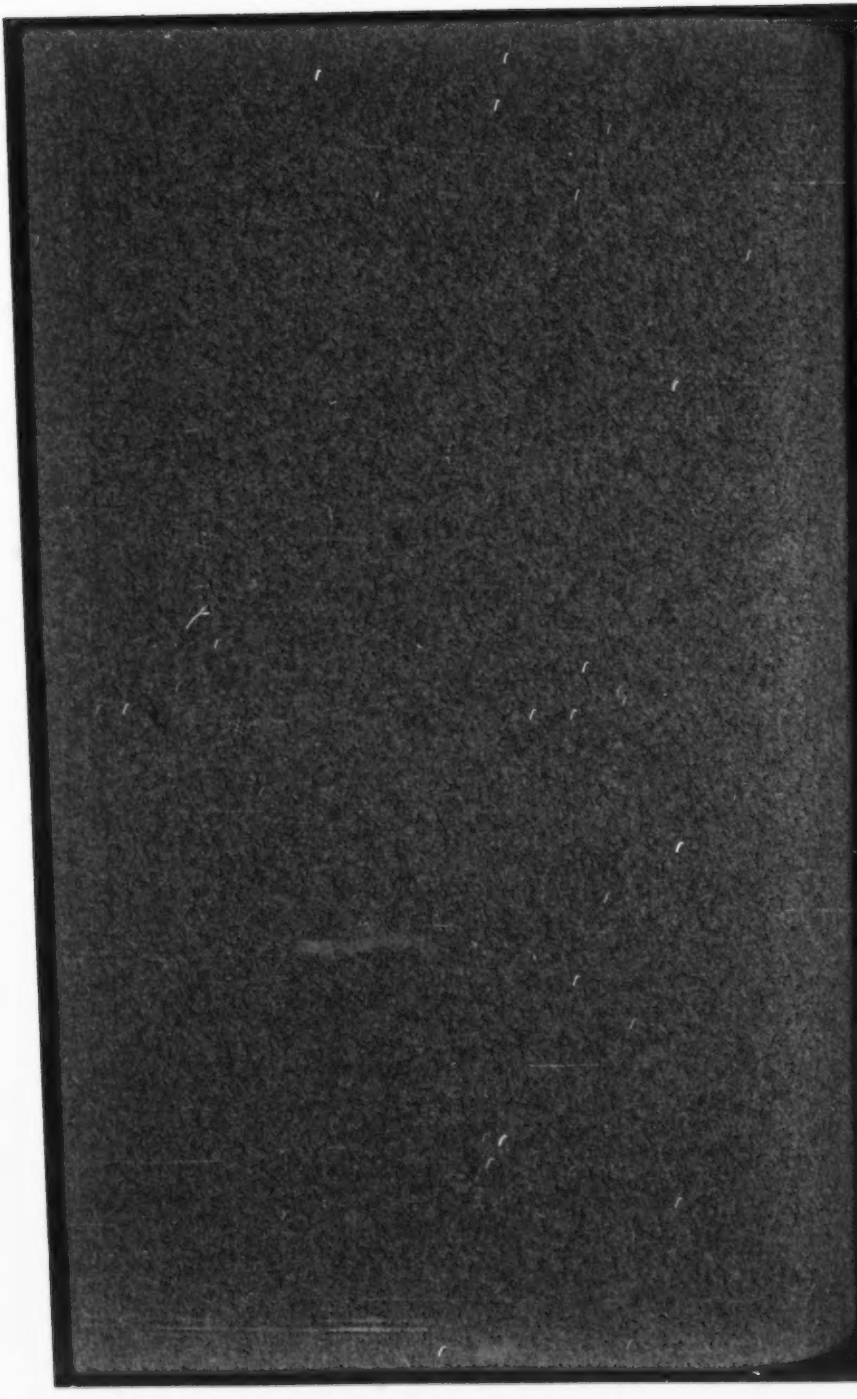

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 26—Original.

IN THE MATTER

of

Transportes Maritimos do Estado, owner of the S.S. "Sao Vicente," upon the application of the Republic of Portugal for a Writ of Prohibition and/or Mandamus,

Petitioner,

against

HON. WILLIAM BONDY and HON. FRANCIS A. WINSLOW, Judges of the District Court of the United States for the Southern District of New York,

Respondents.

BRIEF ON BEHALF OF HON. WILLIAM BONDY and HON. FRANCIS A. WINSLOW, AND OF THE OTHER JUDGES AND OFFICERS OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, IN OPPOSITION TO THE PETITION FOR THE ISSUANCE OF THE WRITS OF PROHIBITION AND/OR MANDAMUS.

This original proceeding was instituted against the Judges and officers of the District Court of the United

States for the Southern District of New York upon a petition executed and filed on behalf of one d'Alte, Portuguese Minister to the United States, by the proctor for the Transportes Maritimos do Estado, owner of the S.S. "Sao Vicente." The petition is executed by F. Dudley Kohler, the proctor who has been appearing for the vessel for the past two years in all the proceedings taken in the District Court and Circuit Court of Appeals, and not by the Portuguese Minister or, in his absence, by the Charge d'Affaires or other diplomatic representative of Portugal.

The cause now comes before this Court upon a rule directing the said Judges and officers of the District Court to show cause why the relief prayed for should not be granted.

The petition refers to a suit brought in Admiralty in the District Court by the Stephen Ransom Dry Dock & Repair Corporation against this vessel *in rem for repairs ordered by the master.* It prays that this Court issue a writ of prohibition to stay further proceedings to carry into effect the judgment already entered in that suit, and, by a writ of mandamus, to direct the District Court to reconsider and reverse itself on all proceedings heretofore taken and to vacate the general appearance and bond filed by the said vessel, and to dismiss the libel.

The Case.

The question as to what, if any, immunity may be granted to foreign government-owned, unarmed merchant vessels, engaged in competitive general commerce, was

not properly raised in this case, and need not be decided herein. Government ownership of this vessel is very doubtful.

The question in this case, if indeed any question is properly raised for consideration on this petition, is obviously a question of substantive law as to the effect to be given to the general appearance and steps taken by the vessel before the attempted suggestion was filed. This is a question of waiver and is not one relating to the original assumption of jurisdiction by the Court, or the excessive exercise by the Court of a limited jurisdiction beyond the powers conferred, or to the jurisdiction of the Court as a Federal Court.

The proceedings taken and the facts developed in the District Court have been fully set forth in detail in the return where the steps have also been listed in chronological order on Pages 2 and 3.

The cause of action arose and the arrest was made in 1921, long after the war was over. The vessel was concededly an unarmed merchant vessel owned by the Transportes Maritimos do Estado, and was carrying passengers and general cargo (Petitioner's brief, page 20). The only basis alleged for the claim of the vessel's immunity is that the Transportes Maritimos do Estado, its owner, was either a branch or subsidiary of a Portuguese Government department. It does not seem to be claimed that the government directly owned the vessel.

Speaking generally, the material steps taken herein were the general appearance of the vessel through its agents, the claim of owner and substitution of a domestic surety company bond for the vessel, the procuring of ex-

tensions of time to answer the libel, the filing of an answer to the merits, alleging among other defenses the right to claim immunity and praying for the dismissal of the libel, the entry of various interlocutory orders, the entering of an interlocutory decree without objection from the petitioner's proctor, appearing generally before the Special Master for the computation of damages, the entry of the final decree condemning the surety company as stipulator on the bond, the appeal therefrom to the Circuit Court of Appeals, and the affirmance by that Court of the final decree of the District Court.

No suggestion of the privilege of the vessel to immunity from process was asserted when the vessel was seized. On the contrary, steps were taken by the vessel which even the petitioner now admits, and always has admitted, constituted a general appearance. (Petition, Pages 7, 34.)

No step of intervention or suggestion was at any time made or filed by the United States through the Secretary of State or Attorney General. It appears from the certificate attached to the original suggestion of the Ambassador (Petition, Pages 40 and 44) that it expressly refrained from accepting the facts stated as true, or intervening in any way, saying—

> "For the contents of the annexed document the Department assumes no responsibility".

The vessel was not held in custodia legis, but, on the contrary, was released upon the substitution of a domestic surety company bond for the amount of the libel, and the filing of a claim of owner. The material provi-

sions of the claim (Petition, Pages 18, 19) are that the Transportes

"appears before this Honorable Court * * *, is the true bona fide owner of the Steamship 'Sao Vicente', and that no other person is the owner thereof; wherefore it prays to defend accordingly."

"Transportes Maritimos do Estado,
By C. B. Richard & Co., Agents,
By Leonard W. Simmons, a Partner".

and the material portions of the stipulation (pages 21, 22) are—

"And the parties hereto hereby consenting and agreeing that, in case of default or contumacy on the part of the claimant or its surety, execution for the agreed amount with interest thereon from this date, may issue against their goods, chattels and lands,"

and that if the claimant or the said American Surety Company—

"shall abide by all the orders of the Court, interlocutory or final and pay the amount awarded by any final decree rendered by this Court, or by any Appellate Court if an appeal intervene, with interest, then this stipulation to be void, otherwise to remain in full force and virtue."

Subsequently an answer was filed and thereafter no proceedings were taken in the instant suit for two years. By that time, the decision in The Sao Vicente, 260 U. S., 151, had been rendered. Upon that decision a motion was made for an interlocutory decree. To this decree the proctor for the vessel assented in open Court (Return, Paragraphs 28, 29, Pages 12, 13), and the decree was entered with an order of reference to compute.

An examination of the proceedings taken before the Special Master and set forth in detail in the return

(Paragraph 30, Pages 13-15), shows that the appearance there was likewise general and not special, and it was not until after the decision on the merits and amount had been adverse to it that the claimant sought to be relieved of the effect of these appearances by filing a suggestion from the Minister.

At no time did the vessel, claimant or proctor offer, or attempt to offer, any proof or evidence of the sovereignty alleged, although ample opportunity to do so was extended them and in fact the request made that such be done.

The District Court and Circuit Court of Appeals having decided the issues against the vessel, it is now sought by this petition to secure relief on a tardy allegation that the appearance of the vessel was without binding force on the Portuguese Government and that the vessel could not contract through its master (Petition, Paragraph 4, Page 6; Petitioner's Brief, Point VI, Page 23). No proof of this lack of authority was ever offered. It is admitted that the C. B. Richard & Co., who executed the bond and claim and appearance, were general agents of the vessel, and that these acts were the acts of the owner of the vessel—the Transportes (Petitioner's Brief, Point VIII, Page 31).

POINT I.

Reply to Petitioner's Brief.

Certain material admissions are made in the petitioner's brief—

(1) The vessel was carrying commercial cargo and engaged in general commercial business. (Point V, Page 20). This contradicts the representations made in the petition as to the business of the vessel (Page 6). It is in accord with prior statements to our trial court and the advertisements in the press at the time. (Return, Paragraph 12, Page 6; infra, Page 17.)

(2) The sole claim to immunity from process is the alleged ownership, regardless of employment. Thus the case is brought within, and answered by, the principle announced by this Court long ago in saying:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

Bank of U. S. *vs.* Planters Bank, 9 Wheat. 904, 907.

(3) The claim of owner and bond for value and obtaining of the release of the vessel were the acts of the owner, the Transportes Maritimos, itself, and not the unauthorized and repudiated acts of the agent, C. B. Richard & Co. (Point VIII, Page 31). This likewise contradicts and withdraws another representation on

which this Court was requested to issue this rule (Petition, Paragraphs 4 and 5, Pages 6, 7). Both the petition and the brief claim the Transportes was the government acting through that department or under that name. What then could be more clearly a general appearance and submission of the owner and petitioner to the court. This would seem to be a complete answer to the entire petition.

(4) The answer, filed six weeks after the claim and bond and release, was intended to be an answer by this petitioner and all steps taken thereafter were taken on its behalf. (Point VI, Page 23.)

Petitioner argues that in theory and practice there is a difference between the immunity given a sovereign before its own Courts and before the Courts of a foreign country. Petitioner mistakes the nature of this difference. (Point IV, Page 7.)

The immunity of a sovereign before its own Court is a right. The immunity of a sovereign before a foreign Court is a privilege. Either the right or privilege may be waived.

> Clark *vs.* Barnard, 108 U. S. 436, 447;
> Porto Rico *vs.* Ramos, 232 U. S. 627, 632;
> Richardson *vs.* Fajardo Sugar Co., 241 U. S. 44, 47.

In the case of a sovereign before a foreign court, the court is not bound to take judicial notice of his sovereignty, and his privilege must be asserted at the outset and proved as is any other extraneous fact. Unless asserted at the outset, it is deemed waived by any acts of general appearance. An express waiver is not necessary.

In our practice such privilege must be asserted in a particular manner.

Ex Parte Muir, 254 U. S. 522;
The Pesaro, 255 U. S. 216.

These cases answer completely petitioner's argument under Point VI, page 23 also.

The cases so strongly relied upon by petitioner throughout its brief are not in point.

In The "Western Maid", 257 U. S. 419 (sometimes referred to in the brief as U. S. *vs.* Thompson), the Return, page 20, shows that the appearance and claim at the outset were special and raised the very point of immunity by saying they were "without admitting the jurisdiction of the said court in the case and without submitting the rights of the United States to the said jurisdiction." This is flatly contrary to petitioner's statement (page 29, sec. 3) that there was a general appearance.

Furthermore, in that case the vessel was admittedly engaged in a public service. It may possibly be argued that the case holds that a government owned public vessel cannot be said to commit a *tort* against its own citizens over which the sovereign's own courts may exercise jurisdiction. It is exceedingly doubtful, however, whether this Court intended the decision to go so far as to hold that a foreign government-owned vessel in private merchant service could not contract through its master for necessary repairs and supplies, or that such contract, if made, was a nullity in our courts.

In The "Maipo", 252 Fed. 627, and "The Oliver American Trading Co., Inc., against The Government of the U. S. of Mexico" (D. C., S. D. N. Y.), N. Y. L. J. Oct. 18, 1923, a most casual examination of the decisions shows that the initial appearances and proceedings were special and not general and that the objection of immunity was raised at the outset. Furthermore, The Maipo was a naval vessel, not by documentation alone, but physically and visibly, while in Oliver Trading Co. *vs.* U. S. of Mexico the party defendant was, on the face of the papers, a government and the principal question was whether the defendant was in fact a sovereign power.

Transportes Maritimos *vs.* DeSimone, 200 N. Y. App. Div. 82, turned upon a technical provision of the New York Code. The case is in effect overruled by the decision of this Court in The Sao Vicente, 260 U. S. 151, wherein it was brought before this Court and argued at length.

The fallacy of Point VI, page 23, lies in the fact that the subject matter of the suit is not government property, but the amount due for repairs. There is nothing in the doctrine of immunity that makes such repair contracts, made by the master, *void ab initio*. Even the "Western Maid" does not go to that length. The immunity is a privilege to be exempt from process only. This may be and has been waived. It goes to a jurisdiction over the person only—never to the subject matter. Here the person was the vessel, but that person has been removed and in its place has been put one of our own citizens—the surety company. It is against this company and not the vessel that the court is now exercising jurisdiction.

What could be a clearer expression of waiver of privilege and the submission of the person to the court than the acts of this petitioner and its present proctor, even after the general appearance, such as the answer on the merits, the assent to the interlocutory decree (Return, page 12), the various orders (Return, pages 10, 12), and extensions of time (Return, paragraph 20, page 10) the proceedings before the special master (Return, pages 13-15), and the appeal to the Circuit Court of Appeals. The effect of these is more fully discussed in our own brief (*infra*, Point II-B, pages 20, *seq.*).

Petitioner also is in error in stating (Point VI, middle page 23) that its appearance here was accompanied by protest. On the contrary the appearance was clean and general. The answer was a defense and not a plea in bar and was filed some six weeks later (Return, pages 2, 3). It prays for a dismissal of the libel with costs which could not be done unless the court had jurisdiction.

The argument advanced under Point VII, page 29, is answered by the long line of decisions to the effect that a suit in admiralty in rem is not a suit against the owner, in personam, nor against the government whose flag she flies.

> The Davis, 10 Wall 15;
> Bank of U. S. *vs.* Planters Bank, 9 Wheat. 904;
> Smyth *vs.* Ames, 169 U. S. 466, 518;
> Prout *vs.* Starr, 188 U. S. 537.

As to Point X, page 35, it may be admitted that there are certain cases where the writs here sought may issue, but, as we shall endeavor to point out below, the present is not one of those cases. The situations in the "Western Maid", and "In re State of New York" were totally different.

While it is true that an appeal in admiralty is a trial de novo on the issues as to merits, we find no authority for the proposition advanced under Point XI, page 37, that the effect of a general appearance or voluntary submission of the person to the court's jurisdiction can be opened up there. It is a complete answer, however, to point out that petitioner on the appeal did not offer any evidence and did not ask for a certificate to this Court. It could have petitioned for writ of certiorari. Instead it took the present mode of instituting a new original proceeding. It must now stand on the record made below.

The argument of the petitioner, as a whole, is merely that a foreign sovereign may come into court, submit its person to the court, and issues of merits for a decision, and not be bound by its own acts, so that when adverse decisions are rendered it can go out of court again at will, and meanwhile delay our citizens interminably. Such may be the foreign law, but it is not our law as this Court has expressly held in Porto Rico *vs.* Ramos, 232 U. S. 627, 632, and other cases.

We cannot agree with petitioner's argument (Point I, page 3) that the issues here are now of public importance. In future cases the privilege, if it exists, can be protected by special appearance. But such future suits can hardly arise, for claimant has repeatedly said in open court that the vessels are not now operated and do not come to our country.

Petitioner's statement that there are now pending several suits against these vessels involving vast sums of money, which will be affected, would seem to be without support. There have been many suits against the "Sao Vicente", "Murmagao", and "San Tiago" but most of

them have been settled, and vast sums paid out. Only a few remain. Since petitioner has chosen to go outside the record and refer to this, we shall also. An inspection of our docket in the Southern District Court shows only two other cases *in rem*, namely,—Bordeaux & New York Trading Co. *vs.* S. S. "Sao Vicente" for $100, cargo damage, and L. Boyer & Son *vs.* the S. S. "Sao Vicente" for $4,300 collision damages; in the Eastern District of New York, only one, Carroll et al. *vs.* the S. S. "Sao Vicente" for $3,600, wharfage; in New Jersey, only one, namely,—Scott *vs.* the S. S. "Sao Vicente" for $50,000, salvage, which was decided in favor of the libelant and is at present pending in the Circuit Court of Appeals for the Third Circuit.

The Minister's suggestion in this case is the same as that presented to the Supreme Court in the former case.

Point III, page 4 is completely answered by the decision of this Court in The Sao Vicente, 260 U. S. 151, where the identical pleading was held insufficient as a pleading of public character or immunity.

The most that can be said of the motion on the pleadings is that it might be an assumption, for the purpose of the argument, of facts properly pleaded, but only facts properly pleaded.

Straus *vs.* Foxworth, 231 U. S. 162

There was no actual proof as to the public ownership of the vessel. It certainly is not admitted. The statement in the claim of owner is to the contrary. The answer and suggestion cannot be taken by themselves as proof.

The Pesaro, 255 U. S. 216;
Ex Parte Muir, 254 U. S. 522.

POINT II.

THERE WAS NO UNLAWFUL ASSUMPTION OR EXERCISE OF JURISDICTION BY THE DISTRICT COURT.

A.

THE COURT HAD APPARENT JURISDICTION OF THE SUBJECT MATTER AND THE PERSON.

The Constitution of the United States in Article 3, Section 2, confers upon the Courts of the United States jurisdiction of Admiralty causes in the following words—

"The judicial power shall extend * * * to all cases of Admiralty and marine jurisdiction * * *,"

and original jurisdiction in this subject has been conferred on the District Courts in Section 24, Article Third, of the Judicial Code—

"of all causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where * * *."

That this jurisdiction is broad enough to include suits by citizens against foreign vessels is too clear to require citations.

The vessel was found and arrested within the territorial waters of the District Court issuing the process (Petition, Page 20a; Return, Paragraph 10, Page 6).

The suit herein referred to was to recover for repairs rendered to the S. S. "Sao Vicente", an unarmed general merchant and passenger vessel, upon the order of its master. The subject matter is thus clearly within the

jurisdiction conferred on the District Court of the United States as a Federal Court.

The Sao Vicente, 260 U. S. 151;
The Southcoast, 251 U. S. 519;
Rounds *vs.* Cloverport Foundry Co., 237 U. S. 303.

Neither the Republic of Portugal or its Minister or its alleged department, the Transportes Maritimos do Estado, were original parties to the suit. If they have become parties, they have done so by voluntarily injecting themselves into the case through the claim of owner, appearance, bond and answer.

This suit was *in rem* against the vessel only, and such a suit, even against a foreign vessel, is not a suit against the government whose flag she flies, or even against her owner.

The Davis, 10 Wall. 15;
Smyth *vs.* Ames, 169 U. S. 466, 518;
Prout *vs.* Starr, 188 U. S. 537;
Bank of U. S. *vs.* Planters Bank, 9 Wheat. 904.

A general appearance, surety company stipulation for value, and claim of owner executed in name of a corporate entity were filed with the Court. Nothing indicated the absence of jurisdiction. Everything pointed to its presence.

The Pesaro, 255 U. S. 216.

B.

IMMUNITY FROM PROCESS, SUCH AS IS CLAIMED HERE, IS A PRIVILEGE OF THE PERSON WHICH CAN BE WAIVED AND HAS BEEN WAIVED IN THIS CASE.

It is not conceded that this vessel was sovereign owned. But even if it were, the immunity of the property of a foreign sovereign from the processes of the Federal Courts of our country is a privilege to be asserted and not an absolute right.

The Santissima Trinidad, 7 Wheat. 283, 353.

In the case of armed vessels of war and of vessels engaged in a purely public governmental function in connection with the government enterprise of war, such privilege has been granted, when asserted at the outset by appropriate measures, on the theory of comity.

The Exchange, 7 Cranch 116.

Up to the present time the Courts have sought to limit rather than extend the privilege, and have not been prepared to take the long step of extending it unnecessarily or to merchant vessels engaged in general shipping business, even if shown to be government owned.

Ex Parte Muir, 254 U. S. 522;
U. S. *vs.* Wong Kim Ark, 169 U. S. 649.

In the present petition the Portuguese Minister claims immunity for the vessel by reason of the fact that the government of Portugal has embarked in the shipping business and owns the Transportes Maritinos which in

turn owns the S. S. "Sao Vicente". It is represented in the petition (Paragraph 3, Page 6) that the vessel was manned by Naval Reserve officers and crew and engaged in Governmental operations as transport for the general account of the Government of Portugal. Petitioner's brief now admits it was engaged in general business (page 20). Practically all merchant marine officers are members of the Naval Reserve, so that that fact cannot give immunity, otherwise all vessels, say of the Cunard line, would be immune. The record shows no proof of these allegations was ever offered to the District Court (Return, Paragraph 11, Page 6). On the contrary, the vessel was advertising generally for general cargoes and for passengers for various Portuguese and Spanish ports. One of the advertisements appearing in the shipping columns of the newspapers of New York is as follows:

"TRANSPORTES MARITIMOS DO ESTADO
Fast Passenger and Freigh' Service.

NEW YORK to LISBON, OPORTO, VIGO
AZORES, CANARY ISLANDS and MADEIRA
Also other Spanish ports, sufficient cargo offering.

Transshipments to East and West African Ports
S. S. *SAO VICENTE* From New York—APRIL 12.

* * * * * *

For rates and other information apply to
C. B. RICHARD & CO. Agts.,
29 Broadway, N. Y.
Tel. Whitehall 0500, Ext. 9."

Under such facts, it is extremely doubtful whether immunity, even had it been appropriately asserted at the

outset, would be granted by this Court, which has already said—

"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

Bank of U. S. *vs.* Planters Bank, 9 Wheat. 904, 907.

However, that question is not presented in this case and need not now be decided herein.

The problem in this case is one of waiver—can such a claim be waived and has it been waived? The answer is in the affirmative.

There is no question of there being jurisdiction of the subject matter in this suit. The suit is brought to enforce a maritime lien for repairs duly performed upon the orders of the master or duly authorized persons in possession of the vessel at the port of repair.

The objection raised is one of the jurisdiction of the person or *res*. The immunity of the person from the process is a privilege. Being a privilege, even sovereign immunity can be waived and is waived unless asserted at the very outset of the litigation by way of a special appearance for that purpose,

"The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a Court of the United States would be a voluntary submission to its jurisdiction;"

Clark *vs.* Barnard, 108 U. S. 436, 447,

"Although a State may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment."

Gunter *vs.* Atlantic Coast Line, 200 U. S. 273, 284.

"The complaint having been amended as moved and directed and nearly a year having elapsed, there came a change of view, but the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step."

Porto Rico *vs.* Ramos, 232 U. S. 627, 632.

"A reversal of the District Court's action is asked upon the theory that the proceeding is against Porto Rico, a government of sovereign attributes which has only consented to be sued in its own courts. Porto Rico *v.* Rosaly, 227 U. S. 270. Whatever might have been the merit of this position if promptly asserted and adhered to, we hold, following the principles announced in Porto Rico *v.* Ramos, 232 U. S. 627, that having solemnly appeared and taken the other steps above narrated, plaintiff in error could not thereafter deny the court's jurisdiction."

Richardson *vs.* Fajardo Sugar Co., 241 U. S. 44, 47; also

Gracie *vs.* Palmer, 8 Wheat. 699;

In re Moore, 209 U. S. 490;

The Santissima Trinidad, 7 Wheat. 283, 353.

Once waived, it cannot be later asserted. Even a sovereign cannot come in and go out of Court at its own will.

Porto Rico *vs.* Ramos, 232 U. S. 627, 632.

In the case of a claim of foreign sovereign immunity, the right must not only be asserted at the outset, but must be asserted in a particular manner.

Ex Parte Muir, 254 U. S. 522;

The Pesaro, 255 U. S. 216;

These steps were not taken in the present case. Not only was there a general appearance here, but our State Department expressly refrained from intervening. See Certificate, Petition, Pages 40 and 44, endorsed—

"For the contents of the annexed document the department assumes no responsibility."

The various steps taken by claimant have been such as to constitute a waiver of any immunity of the person it might have been entitled to. Thus, a general appearance, claim of owner and stipulation for value has this effect,

Clark *vs.* Barnard, 108 U. S. 436, 447;
Ex Parte Chicago, R. I. & P. Ry. Co., 255 U. S. 273,

unless specifically reserving in those documents, at the outset, the question of suability, and continuing to protect and preserve this reservation by subsequent appropriate steps.

Pacific National Bank *vs.* Mixter, 124 U. S. 721;
Cricket S. S. Co. *vs.* Parry, 263 Fed. Rep. 523; (certiorari denied 252 U. S. 580);
Gracie *vs.* Palmer, 8 Wheat. 699;
Ex Parte Muir, 254 U. S. 522.

So also, an answer or plea to the merits at the outset, even if coupled with a plea or demurrer to the jurisdiction.

Western Loan Co. *vs.* Butte Mining Co., 210 U. S. 368;
St. Louis &c. Ry. *vs.* McBride, 141 U. S. 127;
Harkness *vs.* Hyde, 98 U. S. 476;

and the obtaining and accepting extensions of time to answer,

Jones *vs.* Andrews, 10 Wall. 327;
In Re Moore, 209 U. S. 490;

and appearing before a Special Commissioner on taking of testimony.

Ex Parte Chicago, R. I. & P. Ry. Co., 255 U. S. 273.

The document filed by the Portuguese Minister after interlocutory decree was not so much a tardy suggestion as a petition "that the above entitled action be dismissed" (Petition, Page 39), and it was so designated. It was the same petition as presented to this court in The Sao Vicente, 260 U. S. 151.

Immunity, if it exists, does not bring about the dismissal of a libel but only stays the process of the Court.

The claim of owner and stipulation for value were filed by Messrs. Barry, Wainwright, Thacher & Symmers, reputable proctors in Admiralty and members of the District Court bar. The release of the vessel was prayed for and obtained by them. The proceedings were in all respects regular. The collateral attack against the claim of owner attempted in the petition has been withdrawn in the brief, and petitioner now concedes that the claim was duly filed on behalf of the owner (page 31). The claim was made, not in the name of the Portuguese Government, but in the name of the Transportes Maritimos do Estado, as owner of the vessel, and this ownership is admitted in the petition and brief.

It would seem in fact that C. B. Richard & Co., had authority to represent the petitioning government of Portugal as well as the vessel. In the petition (Paragraph Sixth, Pages 38, 39) reference is made to the fact that after the appearance herein, the government caused notices to be sent out to creditors of the ship requiring them

to file claims with the American agent of the Government. The notice thus referred to is as follows—

"F. Dudley Kohler,
Proctor in Admiralty.

25 Broadway, N. Y. C.
November 14th, 1922.

Stephen Ransom Dry Dock Co.,
407 West St.,
New York City.
Clarence K. McGuire,
15 William St.,
New York City.

Re: Claims vs. Transportes, etc.

Dear Sirs:

In the above matter I beg to advise you that the Portuguese Government announced a few weeks ago that all claims arising from the operation of its ships must be duly filed within seventy days or be outlawed.

If you desire to preserve your alleged right of claims, I suggest that you prepare your claim and attach whatever proofs you may have and present it to C. B. Richard & Co., as agents.

Yours very truly,
F. Dudley Kohler."

If, as petitioner argues on page 5, et seq., of his brief, the Transportes was in fact the government of Portugal, then, since he concedes the Transportes was the owner and duly appeared generally (page 31), the government itself has appeared and submitted through that claim and bond and cannot now be heard to question its effect.

By the release everything had been accomplished which the Portuguese Minister could have accomplished had he made a proper special appearance and suggestion at the outset. The vessel went about her business promptly and, in her place and stead, there was substituted a bond of a domestic surety company. The foreign property was removed and property of our own citizens substituted. The rights and privileges of im-

munity, if any, did not pass to this bond, and surely the Court had unquestionable jurisdiction over it.

The Luigi, 230 Fed. Rep. 493.

If this bond was executed and filed without the authority of the petitioner, that might possibly be a defense as between the petitioner and the surety company, but it certainly can be no objection to the jurisdiction of the Court over the surety.

Any remaining objection to the jurisdiction of our court was disposed of by the nature of the answer, wherein the claim of immunity was asserted, not as an objection to jurisdiction, but as "a separate, distinct and complete defense" (Petition, Page 28). This was the direct submission to the Court for its determination of an issue directly within its jurisdiction,

Ex Parte Pennsylvania, 109 U. S. 174
Ex Parte Chicago, R. I. & P. Ry., 255 U. S. 273,

and was thus a submission which, in itself, waived the question of jurisdiction of the person.

"Whether, if he had made the motion on the first ground alone he would have waived his personal exemption, it is not necessary to decide. His moving to dismiss for want of equity was clearly a waiver; and he was properly required to answer the bill. After this the question of jurisdiction over the person was at an end, and the decree of the Circuit Court, dismissing the bill for want of jurisdiction, must be reversed."

Jones *vs.* Andrews, 10 Wall. 327, 332.

No proof of the matters alleged in the answer or petition was ever offered. The Court was therefore justified in holding against the claimant on the issues pleaded.

The Pesaro, 255 U. S. 216,
Ex Parte Muir, 254 U. S. 522.

C.

IT WAS NOT AN EXCESSIVE EXERCISE OF JURISDICTION FOR THE DISTRICT COURT TO ENTER THE INTERLOCUTORY DECREE.

A motion was made herein for an interlocutory decree upon the insufficiency of the answer.

This answer was based purely on information received from records relating to the "Mormugoa" and not this vessel (Petition, Page 30), but these records and communications were not set forth. Further, this identical answer had been held insufficient in a similar case—

The Sao Vicente, 260 U. S. 151.

The facts alleged were not properly pleaded and were therefore not admitted on such a motion.

Straus *vs.* Foxworth, 231 U. S. 162, 168.

The Court would therefore have been justified in granting the motion for judgment on the pleadings herein and entering the decree on this alone, but was supported by the express submission and assent of the petitioner to the entry of such decree (Return, Paragraph 28, Page 13). This was done by the present proctor, Mr. Kohler, in open Court. The petitioner cannot now complain of any wrongful exercise of jurisdiction by the Court in respect thereto.

In re Moore, 209 U. S. 490.

D.

IT WAS NOT AN EXCESSIVE EXERCISE OF JURISDICTION FOR THE DISTRICT COURT TO VACATE THE ORDER OF ALLOWANCE OF APPEAL TO THE SUPREME COURT DIRECT.

The appeal to the Supreme Court direct was taken under Section 238 of the Judicial Code, which provides,

among other things, as a condition precedent to such appeal, that the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision. The petitioner did not choose to take the appeal on the question of jurisdiction alone, but accompanied his papers with general assignments of error. No certificate as to the jurisdictional question accompanied them. The certificate was subsequently applied for and refused. The appeal, therefore, was not perfected, and the order allowing it was a nullity. The Court was quite correct in vacating its improvident order of allowance.

Appeal direct to the Supreme Court, under the circumstances in the case, was not proper. The appeal should have been to the Circuit Court of Appeals.

The Attualita, 238 Fed. Rep. 909;
Seney *vs.* Swift & Co., 260 U. S. 146.

The vacating of the order allowing the direct appeal, if an error at all, was either harmless error or such an erroneous decision as to be corrected upon appeal in the usual way. This course the claimant, in fact, adopted (Return, Page 28) by appeal not only from the final and interlocutory decrees, but also from the order vacating the direct appeal. If the claimant still feels that the decisions of the District and Appellate Courts were erroneous, its remedy is by appeal in the usual course to this Court, and not the present application for the extraordinary writs.

In re Rice, 155 U. S. 396.

POINT III.

THE WRITS OF PROHIBITION AND MANDAMUS SHOULD NOT BE ISSUED IN SUCH A CASE AS THIS.

This is an independent suit going only to the original jurisdiction of the Trial Court, as it appeared to that Court at the outset, and does not go to review that Court's decision—

Mt. Vernon Cotton Co. *vs.* Alabama Power Co., 240 U. S. 30;
In Re Cooper, 143 U. S. 472

and the granting of leave to file this original petition, which is usually granted as a matter of course, does not bind the Court to the granting of the writ, as it is no indication that the want of jurisdiction exists.

State of Minnesota *vs.* Hitchcock, 185 U. S. 373.

Questions of political expediency do not enter into consideration for the writ, and, where there has been a delay, petitioner must show an irresistible case of lack of jurisdiction upon the face of the proceedings.

In Re Cooper, 143 U. S. 472.

Such a case is not made out where the vessel seized upon an Admiralty cause was within the territorial waters of the District issuing the process,

Ex Parte Pennsylvania, 109 U. S. 174,

nor where the question of jurisdiction is obscure and linked with questions touching upon the liability of the petitioner,

"We cannot say the court below was clearly without jurisdiction to determine all the points presented. Moreover, by appeal in the ordinary way, possible errors can be corrected; and there is no imperative reason for awarding a writ of prohibition."

Ex Parte Davis, 262 U. S. 274, 276
The Pesaro, 255 U. S. 216

nor where the absence or presence of jurisdiction is of uncertain solution and not plain on the face of the record,

"It is not plain that there is an absence of jurisdiction here for the question is an open one and of uncertain solution. On application to the State Department, it declined to ask the Attorney General to present to the District Court a suggestion avowing that the ship belonged to the Turkish or Ottoman Government and was immune from seizure. We regard the situation as one in which to refuse the writ would be a proper exercise of discretion. There are stronger reasons against granting a writ of mandamus."

Ex Parte Hussein Lutfi Bey, 256 U. S. 616, 619
In re Rice, 155 U. S. 396
Ex Parte Chicago, R. I. & P. Ry. Co., 255 U. S. 273

nor where there is a remedy by way of appeal from the decisions or proceedings of the Court,

"* * * And finally, it had jurisdiction to determine whether the fact that such earlier proceeding had been instituted on behalf of the Rock Island, that it had actively participated in the conduct thereof, and to that end had entered a general appearance, made it subject to further proceedings thereon by way of cross-bill, as fully as if the earlier action had been taken in its name as well as on its behalf. * * * If in the judgment of the Rock Island the District Court erred in the decision of any one or all of these questions it will have its remedy by appeal, unless it has failed to preserve by appropriate procedure that right of review. The same considerations lead to a denial also of the writ of mandamus."

Ex Parte Chicago, R. I. & P. Ry., 255 U. S. 273, 279-280,

nor where final judgment has been rendered in the lower Court.

"But after final judgment and the lapse of the term, for the Superior Court to enter upon an examination of the evidence upon a suggested defect in the jurisdiction, that is, a defect not apparent upon the face of the record proper, would be for it to rehear the case and direct the court below not to carry its own judgment into effect, for defect of power to try the particular issue rather than of jurisdiction over the cause.

* * * * * * * * *

"United States District Courts sitting in admiralty are courts of superior jurisdiction and every intendment is made in favor of their decrees, so that where it appears that the court has jurisdiction of the subject matter, and that the defendant was duly served with process or voluntarily appeared and made defence, the decree is not open to attack collaterally."

In re Cooper, 143 U. S. 472, 505, 506.

The writ issues only to prevent an unlawful assumption of jurisdiction where none would properly exist within the limits of a jurisdiction conferred.

Ex Parte Gordon, 104 U. S. 515.

It is no ground for the writ that the petitioner has allowed a remedy of appeal to lapse by laches or otherwise.

Ex Parte Roe, 234 U. S. 70.

This Court will not interfere in Admiralty cases where there is undoubted jurisdiction of the subject matter, and the jurisdiction over the person, or res, has been obtained by general appearance, or is undoubtedly present from the face of the record showing personal service within its territorial jurisdiction. Thus the Court has refused to issue the writ and restrain the District Courts from exercising jurisdiction over a libel for pilotage,

Ex Parte Pennsylvania, 109 U. S. 174.

and over a libel *in rem* for wharfage,

Ex Parte Easton, 95 U. S. 68

or for damages for the drowning of a person through collision,

~~In Re~~ Ex Parte Gordon, 104 U. S. 515;

In Re Detroit River Ferry Co., 104 U. S. 519,

or to prevent a vessel-owner from obtaining the benefit for limitation of liability statutes,

Ex Parte Slayton, 105 U. S. 451

or to prevent a hearing before a Special Commissioner.

Ex Parte Roe, 234 U. S. 70.

The writ will not be issued where the matter has gone to a complete adjudication, and there is, or has been, a remedy by appeal.

"But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings * * *."

In Re Rice, 155 U. S. 396, 403.

The granting of the writ of mandamus is on much the same ground as the writ of prohibition, and, in addition, is never granted to compel a District Judge to alter or reverse a decision, either interlocutory or final, especially where in regular course the decision may be reviewed through the processes of appeal.

Ex Parte Roe, 234 U. S. 70;

In Re Morrison, 147 U. S. 14, 26;

In Re Rice, 155 U. S. 396.

What is the situation presented to the Court in this case? Everything before the District Court pointed to

the presence of jurisdiction, and nothing to its absence. It had jurisdiction of the subject matter, and acquired, by general appearance and submission, jurisdiction over the person of the vessel. This was passed to the bond substituted for the vessel before any suggestion of possible privilege or want of such jurisdiction was filed. The record is so clear that there has been a waiver of immunity that the evident purpose of this proceeding is to procure a review of the decision below.

Such is not the office of these extraordinary writs and they should not be granted herein.

POINT IV.

THE FACTS ARE NOT SUCH AS WOULD WARRANT THE GRANTING OF EITHER OF THE WRITS AS AN EXERCISE OF DISCRETION.

The whole petition is a frank appeal to this Court to exercise its discretion in favor of the vessel. To such consideration the petitioner is not entitled. It has been consistently admitted that the appearance was general. There was no attempt to prove the immunity claimed. There never has been any real dispute on the merits, although there was a *pro forma* dispute on the amount, but as to this no proof was ever produced. The conclusion is therefore unavoidable that, when the general appearance was filed, there was no thought on the part of the owners of claiming immunity, and that it was put in as an afterthought for purposes of delay. This is in fact supported by the manner in which the case has been conducted in the courts, and also by statements made by petitioner's proctor both in and out of court. These state-

ments were of the same nature as set forth in the affidavit of Robert S. Erskine, filed in this court upon a motion to dismiss or affirm, in the cases of Maxwell Rose *vs.* the S. S. "Murmugao" and the Transportes Maritimos do Estado (No. 776 and No. 777, October Term 1921, decided November 1922 and reported 260 U. S. 151), wherein it is stated on pages 12, 13, paragraph d, fol. 36,—

> "As an inducement to Rose, the said Kohler stated that he knew that if the litigation continued, the Transportes, by appeals to the higher courts, would seek to delay Rose's recovery as long as possible."

On this it is of interest to note the allegations contained in a libel filed in November of 1921—i. e., shortly after the answer in this case—in the United States District Court for the Eastern District of New York by one Michael F. Hennessy, as assignee of Frank M. Patterson, against the Transportes Maritimos do Estado *in personam* for compensation for Patterson's services as attorney in preparing the answer in this and other cases. A copy of that libel is annexed to this brief as "Schedule A", and in paragraphs designated Second and Seventh will be found an allegation that the Transportes was a foreign corporation and its vessels subject to the jurisdiction of our Courts. It is unlikely that such allegations would have been made under such circumstances by the assignee of Mr. Patterson if the claim of sovereignty had been interposed in good faith.

If the vessel's own attorney, with some knowledge or information of the facts, can feel justified in invoking in his own behalf the jurisdiction of the Court against the Transportes *in personam*, how can it be said that the Court erred in exercising a jurisdiction invoked by innocent lienors against certain vessels *in rem*?

The petition, (page 38) and the petitioner's brief (page 40) represent that the writs should issue because adequate provisions have been made to pay "all just claims" of this character. But there are several answers to this. This claim has not been paid and it is nearly three years overdue. The time to file claims under the notice (supra) has passed, and had expired before the suggestion of D'Atte was filed herein. To stay the present proceedings would be to permit the claimant to delay indefinitely, and would put the libelant, an American citizen, at the mercy of the Portuguese Government. Certainly no forum is more qualified to pass on the amount justly due this libelant than our own Court, in the jurisdiction where the services were rendered. To grant this delay to the claimant would not be an act of discretion to effectuate justice, but would, in fact, work a gross injustice to our own citizens. It is not to be presumed that the Court will use these extraordinary writs to effect this result.

CONCLUSION.

THE CASE IS NOT ONE FOR THE INTERFERENCE BY THIS COURT, THROUGH THE WRIT OF PROHIBITION OR OF MANDAMUS, AND THE RULE TO SHOW CAUSE SHOULD THEREFORE BE DISCHARGED AND THE JUDGES AND OFFICERS OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK SHOULD BE DISMISSED.

Respectfully submitted,

E. CURTIS ROUSE,
Counsel for Defendants.

SCHEDULE A.

To the Honorable Judges of the United States District Court for the Eastern District of New York:

The amended libel of Michael F. Hennessy against Transportes Maritimos do Estado in a cause of contract, civil and maritime, alleges upon information and belief as follows:—

First:—The libellant is a resident of the City of New York (Kings County), and State of New York.

Second:—Upon information and belief, that at all the times hereinafter mentioned, the respondent Maritimos Do Estado, was a foreign corporation, existing under and by virtue of the laws of the Republic of Portugal, owning and operating steamships plying between the United States and Portugal.

Third:—That Frank M. Patterson now is, and at all the times herein mentioned was, an attorney and counselor-at-law and proctor in admiralty, practicing his profession as such in the City, County and State of New York.

Fourth:—Upon information and belief between the 13th day of September, 1920, and the 12th day of September, 1921, both dates inclusive, the said Frank M. Patterson rendered professional services for the said respondent at its request consisting of the defense of numerous libels in rem and in personam brought against said respondent and steamships owned or controlled by it, and in the defense of certain actions brought in the Supreme Court, State of New York, against said respondent and together with various other professional services of a miscellaneous nature, which services were reasonably worth the sum of Fifteen Thousand Dollars ($15,000.) and in the defense of the aforesaid libels and

actions necessarily incurred disbursements amounting to One Hundred and Fifty Dollars ($150.), making a total of Fifteen Thousand One Hundred and Fifty Dollars ($15,150.).

Fifth:—No part of said sum has been paid although duly demanded, except the sum of Two Thousand Five Hundred Dollars ($2,500.), and the sum of Twelve Thousand Six Hundred and Fifty Dollars ($12,650.), is now due and owing by the respondent to the libelant, with interest thereon from the 12th day of September, 1921.

Sixth:—That on or about the 18th day of October, 1921, the said Frank M. Patterson duly assigned the aforesaid claim to the libelant.

Seventh:—Your libelant is informed and believes and so alleges that the Respondent Transportes Maritimos do Estado is a foreign corporation, organized and existing under and by virtue of the laws of the Republic of Portugal and that it is not now engaged in business and cannot be found within the Eastern District of New York, and that service cannot be effected upon it in that District, and your libelant is informed and believes and so alleges that there now in the Eastern District of New York, certain goods, chattels, credits and effects belonging to or claimed by the said Transportes Maritimos do Estados, to wit, the Steamship "Sao Tiago" and certain funds and credits in the hands of other parties in the Borough of Brooklyn, City and State of New York.

Eighth:—Further your libelant alleges that he has no means of redress unless by process or attachment against the said goods, chattels, credits or effects.

Ninth:—All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays that process in due form in personam with a clause of foreign attachment according to the practice of this Honorable Court, in cases of Admiralty and Maritime jurisdiction may duly issue against the respondent Transportes Maritimos do Estados herein, citing it to appear and answer upon oath all and singular the matters aforesaid in this libel; and providing that said respondent cannot be found, then that all property, goods, rights, chattels, effects, etc., belonging to the said respondent and within this District and the jurisdiction of this Honorable Court and particularly the Steamship "San Tiago" and the funds and credits in the hands of the Master of the said Steamship and other parties above mentioned be attached to the sum of TWELVE THOUSAND SIX HUNDRED FIFTY DOLLARS ($12,650.00) the sum sued for in the libel herein, together with interest thereon from the 12th day of September, 1921, and that said Master of said Steamship be summoned to appear and answer under oath as to the respondent's credits and effects in his hands, and that the Court will order, adjudge and decree that the said respondent pay to the libelant his damages as aforesaid together with the interest, costs and disbursements of this suit, and that the Court will order said Steamship be condemned, her boilers, engines, etc., or other property of the respondent which may be attached in the libel and sold to pay and satisfy the same, and that the Court will grant to the libelant such other and further relief as may be just and proper in the premises.

JOHN B. JOHNSON,
Proctor for Libelant,
Office and P. O. Address:
100 Broadway,
New York City.

(Verification.)

In The

Supreme Court of the United States.

OCTOBER TERM, 1922.

Original No. 28.

EX PARTE

In the Matter

of

THE TRANSPORTES MARITIMOS DO ESTADO, a Department of the Government of the Republic of Portugal, owner of the steamship "GRAO VICENTE," making application by His Excellency JOSE D'ALTE, its Minister Plenipotentiary and Envoy Extraordinary to the United States of America for a Writ of Prohibition and/or Mandamus.

Petitioner,

—against—

HON. WILLIAM BONDY and HON. FRANCIS A. WINSLOW, Judges for the District Court of the United States for the Southern District of New York,

Respondents.

EXCEPTIONS TO RETURN OF RESPONDENTS.

F. DUDLEY KOHLER,
Proctor for Petitioner,
No. 30 Broadway,
New York City.

United States Supreme Court.

OCTOBER TERM—1923.

Original No. 26.

EX PARTE

In the Matter

of

THE TRANSPORTES MARITIMOS DO ESTADO, a Department of the Government of the Republic of Portugal, owner of the steamship "SAO VICENTE", making application by His Excellency JOSE D'ALTE, its Minister Plenipotentiary and Envoy Extraordinary to the United States of America for a Writ of Prohibition and/or Mandamus,

Petitioner,

—against—

HON. WILLIAM BONDY and HON. FRANCIS A. WINSLOW, Judges of the District Court of the United States for the Southern District of New York,

Respondents.

EXCEPTIONS TO RESPONDENTS' RETURN.

The petitioner excepts to the return herein of the respondents as follows:

1. It excepts to the statement of the proceedings taken in the District Court as set forth on pages 2 and 3 of said return as incorrect, and

states that the correct statement of said proceedings, according to the Docket of said District Court, is as follows (the words in parenthesis are inserted by us as explanatory):

April 14, 1921. Filed libel and stipulation for costs—monition return 4/25/21.

April 15, 1921. Filed claim of owner and stipulation for value.

April 25, 1921. Filed monition—vessel attached 4/14/21 and released 4/15/21 Barry, Wainwright, T. and S. (Proctors for Claimant).

May 27, 1921. Filed order substituting Patterson, Frank M. (as proctor for claimant).

May 31, 1921. Filed answer (verified by Portuguese Consul pleading immunity from seizure as property of government of Portugal).

Nov. 26, 1921. Filed order of substitution (F. Dudley Kohler as proctor for claimant in place of Patterson).

May 31, 1923. Filed note of issue—motion for decree (for judgment on pleadings).

June 5, 1923. Filed affidavit and notice of motion for decree endorsed Bondy, J. Motion granted (This motion was not granted on consent).

June 9, 1923. Filed order granting motion for judgment (reciting argument by both sides in the order itself and with no intimation of consent).

June 9, 1923. Filed interlocutory decree and reference to B. Mathews.

July 5, 1923. Filed suggestion, petition and information (by Minister of Portugal with certificate of Secretary of State as to his official capacity).

July 7, 1923. Filed note of issue—motion to strike out petition (of Minister of Portugal).

July 9, 1923. Filed Commissioner's report and testimony.

July 10, 1923. Filed affidavit and notice of motion to strike out suggestion, etc. Endorsed A. N. Hand—motion granted.

July 12, 1923. Filed order granting motion to strike suggestion from files.

July 19, 1923. Filed exceptions to report.

July 21, 1923. Filed note of issue—motion overruling exceptions (to report).

July 21, 1923. Filed notice of hearing of exceptions—Endorsed Winslow, *J.*—Exceptions overruled.

Aug. 9, 1923. Filed final decree awarding libellant $15,499.30 and bill of costs.

Aug. 20, 1923. Filed assignment errors.

Aug. 20, 1923. Filed notice of appeal.

Aug. 20, 1923. Filed petition and order of allowance of appeal (signed by Judge Bondy).

Aug. 20, 1923. Filed bond for costs on appeal (approved by Judge Bondy).

Aug. 22, 1923. Citation of appeal returnable Sept. 19, 1923 (signed by Judge Bondy).

Aug. 24, 1923. Filed amended assignment of errors (assigning as error question of jurisdiction only).

Sept. 1, 1923. Filed certificate on appeal and copies of libel, answer, etc. (attached.) Memo endorsed—application for certificate denied, Winslow, *J.*

Sept. 1, 1923. Filed opposing affidavit to allowance of certificate on appeal (Libellant contending therein that the question of law was decided in *Sao Vicente* v. *Tietjen & Lang*, 260 U. S. 151 and that the appeal should be to Circuit Court of Appeals and not direct to Supreme Court).

Sept. 13, 1923. Filed order vacating citation on appeal and order of allowance of appeal (This was granted without notice of motion).

Sept. 14, 1923. Filed order entering summary Judgment against Transportes M. E. for $15,576.80.

Sept. 15, 1923. Issued execution.

Sept. 15, 1923. Filed affidavit, order to show cause for rehearing—Endorsed Manton, *J.* Denied (This was for a rehearing on application for certificate which was denied by Judge Winslow).

Sept. 17, 1923. Filed notice of appeal (to Circuit Court of Appeals according to direction of Judge Manton).

Sept. 17, 1923. Filed assignment of errors.

Sept. 17, 1923. Filed assignment of errors.

Sept. 17, 1923. Filed bond for costs.

Sept. 19, 1923. Filed bond to stay execution.

Sept. 19, 1923. Filed order staying execution.
Oct. 10, 1923. Filed mandate of Circuit Court of Appeals affirming decree with costs at $28.28 interest and damages at 5%.
Oct. 15, 1923. Filed decree on mandate.
Oct. 16, 1923. Filed supersedeas bond—vacated by L. Hand, *J.*, 10-27-23.
Oct. 18, 1923. Entered judgment No. 10406 for $979.51.
Oct. 30, 1923. Issued execution on No. 10406.
Nov. 14, 1923. Filed affidavit and order to show cause for stay of execution—endorsed A. N. Hand, *J.*, stay vacated and motion denied.
Nov. 14, 1923. Filed order of U. S. Supreme Court staying execution until further order.
Nov. 14, 1923. Filed telegram.

2. It excepts to the statement on page 5 of the return, as follows:

> (7) "The petition does not attempt to question our jurisdiction over the subject matter. The claimant never raised this question before us."

as not correct. Not only the petition but the answer of the claimant and the suggestion of the Minister allege that the Court did not have jurisdiction over the Transportes Maritimos do Estado as a part of the government of Portugal or over the property of the said government.

3. It excepts to the statements in the paragraph on page 10 numbered (21) as misleading

on the ground that the answer did deny the material allegations of the libel and on the ground that the issue as to the authority of counsel appearing and answering for the vessel was raised in the suggestion of the Minister and in the argument before the Court on the motions for leave to appeal and for certification of the question of jurisdiction.

4. It excepts to the statement on page 11 in paragraph (23) that the appeal in *Tietjen & Land Dry Dock Co.* v. *Sao Vicente* was dismissed in this Court on the ground that the pleadings were insufficient, as the appeal was dismissed on certiorari in that case on the ground that the Consul-General was not a diplomatic officer having sufficient authority to make the petition for certiorari to this Court.

5. It excepts to the statement on page 12 in the paragraph numbered (25), that the answer ignores the fact that this suit is *in rem* against a merchant vessel and not *in personam* against the government or the Transportes Maritimos do Estado as the answer speaks for itself and the claim of the petitioner is that as the action is *in rem* against a particular vessel owned by a sovereign government, it is in effect an action against that government.

6. It excepts to the statement in the paragraph numbered (28) on page 13 of the Return, that counsel for the petitioner did not object to the granting of the motion for an interlocutory decree and the entering of an interlocutory decree as not

true and not supported by the record. See interlocutory decree, Petition, page 31.

7. It excepts to the statement on page 16 in the paragraph numbered (32) that the "suggestion, petition and information" was a petition that the Court accept the suggestion as true without further proof; inasmuch as the facts alleged therein as to the sovereignty of the petitioner and its property were alleged in the answer and admitted by the motion for a decree on the pleadings.

8. It excepts to the statement on page 17 in the paragraph numbered (36), that the decree was not against the petitioner as the decree mentioned therein was against the Steamship *Sao Vicente*, her claimant and stipulators and therefore was in effect against the Republic of Portugal, the owner of the said steamship, as in all actions *in rem*, the owner of the vessel must ultimately respond to any decree against the vessel and is the party whose property must ultimately be taken in an action such as this against sovereign property and as public vessels are a part of the sovereign state to which they belong, their liabilities are merged in that of the sovereign state and the prerogatives of sovereignty are impressed on the sovereign's property, such an action, therefore, is against the sovereign itself. See pages 12-20 of petitioner's brief.

9. It excepts to the statement in paragraph (39) on page 18 and paragraph 42 on page 19 of this Return, that no request was made to the

Circuit Court of Appeals to certify the question of jurisdiction to this Court as the request that such certification be made was contained in the affidavit of the petitioner in opposition to the motion before the Circuit Court of Appeals to dismiss the appeal to said Court or affirm the decree of the District Court herein, and a request for such certification was also made to said Court by petitioner's counsel on the argument of said motion.

10. It excepts to the statement in the paragraph numbered (43), page 29 of the Return that "the proceeding, through substitution of the bond, is both in substance and effect against a domestic surety company," as wholly untrue as this action is against the principal, that is the Government of Portugal through the attack made on its vessel, and not against the surety whose stipulation was given, as in the case of the *Western Maid*, 257 U. S. 419, to release the vessel.

To the other errors in said Return the petitioner does not believe it necessary to refer, and does not wish to take the time of the Court to discuss them in detail.

Dated, January 15, 1924.

F. DUDLEY KOHLER,
Proctor for Petitioner,
25 Broadway,
New York City.

JAN 17 1924

Supreme Court of the United States.

OCTOBER TERM, 1923.
No. 26, Original.

EX PARTE

In the Matter

of

THE TRANSPORTES MARITIMOS DO ESTADO, a Department of the Government of the Republic of Portugal, owner of the steamship "SAO VICENTE", making application by His Excellency JOSE D'ALTE, its Minister Plenipotentiary and Envoy Extraordinary to the United States of America for a Writ of Prohibition and/or Mandamus,

Petitioner,

—against—

HON. WILLIAM BONDY and HON. FRANCIS A. WINSLOW, Judges for the District Court of the United States for the Southern District of New York,

Respondents.

BRIEF FOR THE REPUBLIC OF PORTUGAL IN REPLY.

F. DUDLEY KOHLER,
Proctor for Petitioner and owner of the S. S. Sao Vicente,
No. 25 Broadway,
New York City.

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United States Supreme Court,

OCTOBER TERM—1923.

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EX PARTE

In the Matter

of

THE TRANSPORTES MARITIMOS DO ESTADO, a Department of the Government of the Republic of Portugal, owner of the Steamship "SAO VICENTE" making application by His Excellency, JOSE D'ALTE, its Minister Plenipotentiary and Envoy Extraordinary to the United States of America, for a Writ of Prohibition and/or Mandamus,

Petitioner,

—against—

HON. WILLIAM BONDY and HON. FRANCIS A. WINSLOW, Judges of the District Court of the United States for the Southern District of New York,

Respondents.

BRIEF OF THE REPUBLIC OF PORTUGAL IN REPLY.

POINT I.

The remedy by writ of prohibition is proper.

I. The power to issue writs of prohibition is given to this Court and this remedy is assured

to the petitioner by Section 234 of the Judicial Code. It is well settled that this remedy is not in the nature of an appeal or to take the place of an appeal. It is a separate and distinct proceeding, and its function is preventive and *not*, as is the appeal, *corrective*. Its purpose as issuing to a District Court, sitting as a Court of Admiralty, as in this case, is to prevent an unlawful assumption or exercise of jurisdiction and lies when the Court is acting in excess of its jurisdiction or is taking cognizance of matters not arising within its jurisdiction. Its office is to prevent an unlawful assumption of jurisdiction (*Ex Parte Phoenix Ins. Co.*, 118 U. S. 610; *Ex Parte Indiana Transp. Co.*, 244 U. S. 456) and not to correct errors or irregularities (*Ex Parte Gordon*, 104 U. S. 515; *Ex Parte Detroit River Ferry Co.*, 104 U. S. 519). It is to prevent the exercise by the Court of a power with which it has not been vested and *not to correct errors* in the exercise of its proper jurisdiction (*Curtiss* v. *Cornish*, 84 Atl. (Me.), 199). In a proceeding upon a writ of prohibition, as stated in *In re Briz*, 135 U. S. 403, 430:

> "The question is whether the District Court *had* jurisdiction and not whether its order refusing to set aside the service of the summons and subsequent proceedings in the action and dismissing the same, *should be reversed*."

The distinction is that the appeal is to correct errors of the Court in the exercise of its jurisdiction, but the writ of prohibition is to prevent the assumption of or exercise of jurisdiction where the Court has no jurisdiction, and in such cases and for this purpose, in this proceeding the writ

should issue, not to take the place of an appeal but to prevent the improper exercise of a jurisdiction which is wholly lacking.

II. It is not necessary where the District Court *has no jurisdiction of the parties or of the subject matter of the proceeding to carry the case to*, and exhaust the remedies, by appeal. The proper remedy is by petitioning for a writ of prohibition which should issue in such a case (*Ex Parte Faucett*, 142 U. S. 479). The petition for a writ of prohibition may be filed at any time where there is a total lack of jurisdiction. In the *Western Maid* (257 U. S. 419), the petition was filed after the objection to jurisdiction was overruled and before answering, and the writ was granted. In *Ex Parte The State of New York, Edward S. Walsh* (256 U. S. 490), where suits were begun by private parties against certain tugs and the owners brought in the Superintendent of Public Works of the State of New York under the Fifty-sixth Rule in Admiralty on the ground that he was in possession and control of the tugs, the petition for a writ of prohibition was filed after the filing of the petition under the Fifty-sixth Rule and the writ was granted and made absolute. In *Ex Parte The State of New York, The Tug Queen City* (256 U. S. 503), a libel *in rem* was filed against a tug owner by the State of New York, and the Attorney General appeared and filed a suggestion and upon the suggestion being overruled the petition for a writ was filed at once and the writ was granted. In all of these cases the prayers in the petition for a writ of prohibition and for mandamus and for other relief

were precisely the same as in the case at bar. It cannot be said that a writ of prohibition cannot be granted in any case where there is a right of appeal. The petition for a writ of prohibition is a separate and distinct proceeding and the right to the writ does not depend upon the lack of a remedy by appeal, but rather upon the question of jurisdiction in the Court of original instance. An application for a writ of prohibition should not be denied on the ground that the relator had a remedy by appeal, where the Court of original instance, as in this case, was without jurisdiction (*State* v. *Colbert*, 56 So. (La.) 273; *Ex Parte Indiana Transportation Co.*, 244 U. S. 456; *Ex Parte State of New York, Edward S. Walsh*, 256 U. S. 490). In the last case cited, this Court held that it had power under Section 234 of *The Judicial Code to prevent a District Court from exceeding its jurisdiction* in Admiralty in a clear case *even where an ultimate remedy existed by appeal*, and said:

> "The fact that objection to the jurisdiction of the Court below might be raised by an appeal from the final decree, is not in all cases a valid objection to the issuance of a writ of prohibition, at the outset where a court of admiralty assumes to take cognizance of matters over which it has no lawful jurisdiction." *In re Cooper*, 143 U. S. 472, 495.

The rule here is that where the lack of jurisdiction in the lower Court *is clear it* is not necessary to show that there was no remedy by appeal, and the Court further and very decidedly in point with the case at bar, said, upon this

question of the certainty of the lack of jurisdiction.

> "That a state may not be sued without its consent *is a fundamental rule of jurisprudence* having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this Court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given; not one brought by citizens of another state or by citizens or subjects of a foreign state, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the amendment is but an examplification (*Beers* v. *Arkansas*, 20 How. 527, 529; *Railroad Co.* v. *Tennessee*, 101 U. S. 337, 339; *Hans* v. *Louisiana*, 134 U. S. 1, 10-17; *North Carolina* v. *Temple*, 134 U. S. 22, 30; *Tills* v. *McGhee*, 172 U. S. 516, 524; *Palmer* v. *Ohio*, 248 U. S. 32, 34; *Duhne* v. *New Jersey*, 251 U. S. 311, 313). * * *
>
> We repeat the immunity of a state from suit *in personam*, in the admiralty brought by a private person *without its consent is clear*.
>
> As to what is to be deemed a suit against a state, the early suggestion that the inhibition might be confined to those in which the state was a party to the record (*Osborn* v. *United States Bank*, 9 Wheat. 738, 846, 850, 857), has ever since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties, but by the essential nature and effect of the proceeding, as it appears from the entire record. (*Louisiana* v. *Jumel*, 107 U. S.

711, 719, 720, 723, 727-728; *Hagood* v. *Southern*, 117 U. S. 52, 57, *et seq.; In re Ayres*, 123 U. S. 443, 487-492; *Pennoyer* v. *McConnaujby*, 140 U. S. 510, *et seq.; Smith* v. *Reeves*, 178 U. S. 436, 438, 440; *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 168-170; *Langford* v. *Platte Iron Works Co.*, 235 U. S. 461, 469.) * * *

"The want of authority in the District Court to entertain these proceedings in personam under Rule 59 (now 56), brought by the claimants against Mr. Walsh, as superintendent of Public Works of the State of New York, is *so clear*, and the facts that the proceedings are in essence suits against the state without its consent *is so evident, that* instead of permitting them to run their slow course to final decree, with inevitable futile result, *the writ of prohibition should be issued as prayed.*"

The parallelism between this case and the case at Bar will be evident. In our case the action is clearly against the sovereign government of the Republic of Portugal, and brought against it without its consent, and the lack of jurisdiction is evidently as clear. The writ of prohibition, for this reason alone, should be granted.

In *Ex Parte the State of New York, The Tug Queen City*, 256 U. S. 503, where the same conclusion was reached, the action was *in rem* against the Tug *Queen City*, owned by the state, as in our case it is against the S. S. *Sao Vicente*, owned by the Republic of Portugal.

In *Ex parte Phenix Ins. Co.*, 118 U. S. 610, where a number of suits were brought against a steamship owner for damage by fire communi-

cated to property on land by a passing steamer, some of which went to judgment, the steamship owner petitioned the District Court for limitation of its liability to the value of the steamer and its pending freight. The respondents moved to dismiss the petition for want of jurisdiction in admiralty. This motion was denied and *without appealing*, the respondents petitioned for a writ of prohibition which was granted *as the lack of jurisdiction was clear.*

The exception to this rule of *not* requiring that there be no remedy by appeal is in cases where the District Court may have had in the first instance some jurisdiction or reasonable grounds for believing that it had jurisdiction, that is where the question of jurisdiction might be doubtful or in cases which are of such a character as those of which the Court might ordinarily have jurisdiction.

III. The petitioner is entitled to a writ of prohibition as a matter of right.

Where, as in the case at Bar, the District Court is *wholly without jurisdiction,* a party is entitled to a writ of prohibition, forbidding the Court of first instance to proceed further with the case on the ground, that cognizance of such cases does not belong to such Court, *that is where it is clear that the Court of first instance has no jurisdiction of the suit or proceeding instituted before it or of the parties to such suit* (*Iberia St. M. & E. R. Co.* v. *Morgans L. & S. S. Co.*, 56 So. (La.) 417; *Ex Parte Fawcett*, 142 U. S. 479; *Smith* v. *Whitney*, 116 U. S. 167, 173; *Ex Parte Chicago, etc. R. Co.*, 255 U. S. 273; *Ex Parte Phenix Ins., Co.*, 118 U. S. 610;

Ex Parte Indiana Transportation Co., 244 U. S. 456; *In re Rice*, 155 U. S. 396; *In re Cooper*, 143 U. S. 472).

In Ex Parte Phenix Ins. Co. and *Ex Parte Indiana Transportation Co., supra,* the Court held that the power of the Court under Section 234 of the Judicial Code to issue writs of prohibition to the District Court, when proceeding as a court of admiralty, to prevent an unlawful assumption of or exercise of jurisdiction was not debatable, and that in some instances, as *where the absence of jurisdiction is plain*, the writ goes as a *matter of right.*

In *Smith* v. *Whitney, supra*, the Court said:

> "It may be said to be discretionary where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the Court whose action is sought to be prohibited is doubtful, or depends on facts, which are not made matters of record. * * * But where that Court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as a matter of right."

According to this case of *Smith* v. *Whitney*, where there may be another legal remedy, by appeal or otherwise, at least this Court has discretion to grant the writ of prohibition and certainly this case at Bar where the lack of jurisdiction in the Court of first instance is so absolutely clear, affords a proper occasion for the exercise of such discretion by this Court in favor of this petitioner

to relieve it from the enforcement against it of an improper or void decree.

In the case at Bar, the lack of jurisdiction of the District Court is unquestionably clear. That this is a suit against a sovereign government at peace with the United States is evident (*ex Parte New York, Edw. S. Walsh*, 256 U. S. 490). It clearly appears on the record. It is shown by the affirmative allegations in the answer, and these for the purpose of this proceeding are admitted by the libellant's motion for a decree on the pleadings. That the petitioner objected to the jurisdiction of the District Court at the outset is shown also on the record, in the answer and suggestion of its Minister. The petitioner also preserved its rights by appropriate procedure. Though it was not incumbent upon it to do so to preserve its right to ask for a writ of prohibition, (*State* v. *Culbert*, 56 So. (La.) 253; *ex Parte New York, Edw. S. Walsh*, 256 U. S. 490) it endeavored to appeal direct to this Court from the decision of the District Court, but this effort was frustrated by that Court's refusal to allow the appeal. Then after consultation with one of the Justices of the Circuit Court of Appeals its counsel appealed to that Court under the ruling laid down in *U. S.* v. *John*, 155 U. S. 109, with the purpose of having, and the request to have the question of jurisdiction certified to this Court, but the Circuit Court of Appeals affirmed the decree and *refused to certify the question of jurisdiction* to this Court. Thereupon the libellant issued execution on its decree in the District Court and this petitioner was unable to secure a stay of any kind

pending any further applications to this Court, so that the only resource left to it was by the petition herein for this writ. This decision of the Circuit Court of Appeals could not be brought up for review by this Court by a writ of certiorari as under the decisions in the *Carlo Poma*, 255 U. S. 219, and the *Sao Vicenti*, 260 U. S. 151, where it was held that the question as to jurisdiction can only be brought before this Court on appeal direct from the District Court or on certification of the question from the Circuit Court of Appeals, both of which were refused.

This writ was desired to prevent the exercise by the Court of powers or jurisdiction where it had no power or jurisdiction whatever in the premises and so as it happens that this was also the sole question on the appeal, the petition for the writ of prohibition and mandamus though not intended to take the place of the appeal, really brought up the same question to this Court as would have come before it had the District Court not refused to allow the appeal. But as we have shown, it is not necessary to exhaust one's remedy by an appeal in cases where *the lack of jurisdiction is plain*. The purpose of the writ is to prevent the lower Court from exercising jurisdiction where it clearly has no right to do so, and this being a suit against a sovereign government is unquestionably such a case.

Further it clearly should make no difference how this case comes before this Court. This is an admiralty suit and the entire question can be taken up *de novo* by this Court, and, as after all the only question is whether under the admitted facts of record the District Court has jurisdiction, and this Court can of its own

motion direct the lower Court to refrain from exercising jurisdiction where it has no right to do so, and it is the policy of this Court to prevent such improper exercise of jurisdiction, this writ of prohibition should clearly be granted for this purpose (Petitioner's Brief, pp. 38, 39).

Where the lack of jurisdiction in the instant court is clear the writ of prohibition should be granted, and it is *not a valid objection that the petitioner may have had a remedy by appeal* (*ex Parte New York, Edw. S. Walsh*, 256 U. S. 490; *In re Phenix Ins. Co.*, 118 U. S. 610; *State v. Colbert*, 56 So. (La.)254). In the cases before this Court involving sovereign immunity, where the immunity was clear the writs of prohibition have been granted, though no appeals were taken. It was only in those cases where the lower Court might have had jurisdiction, or the jurisdiction was *doubtful* that the writs of prohibition have been denied. In no case of such denial was the question of sovereign immunity involved (*In re Baiz*, 135 U. S. 403; *ex parte Easton*, 95 U. S. 68; *In re Cooper*, 143 U. S. 472; *ex parte* Peterson, 253 U. S. 300; *ex Parte Roe*, 234 U. S. 70; *ex Parte Pennsylvania*, 109 U. S. 147).

In fact the decree in this case is wholly void because the Court was without jurisdiction of the parties or the subject matter when it was granted and upon this ground it can be attacked at any time and the writ should therefore be granted to prevent the enforcement of a void decree (*Pope Mfg. Co. v. Arnold*, 208 Fed. 406; *Nankivel et al. v. Omsk All Russian Government* [N. Y. Court of Appeals], 70 N. Y. Law Journal,

p. 1171, Jan. 4, 1924). Surely it should not be and is not necessary to exhaust one's remedy of appeal to have the right to resist the enforcement of a decree that is wholly void for lack of jurisdiction and the writ of prohibition or mandamus should be granted herein to avoid the enforcement of this void decree particularly as it is the only remedy open to the petitioner.

POINT II.

The petition for the writ of prohibition should not be dismissed.

1. The District Court was without jurisdiction and no act of the parties, short of an act of the legislature or chief executive of the Government of Portugal could confer jurisdiction. The appearance in this case does not give jurisdictional power. The objection to jurisdiction cannot, as we have shown be waived. An error of counsel cannot confer jurisdiction. If therefore it were true that a remedy should have been sought by appeal and it was not, this would be an error of counsel only and in a case of clear lack of jurisdiction by the Court it could not cure such a defect of jurisdiction. Neither the District Court nor the Circuit Court of Appeals nor this Court has jurisdiction over this petitioner or this action and consequently has not jurisdiction to affirm the decree or to dismiss this petition for this writ thereby permitting the lower Court to enforce a void decree. The dismissal of this petition and refusal of the writ prayed for would be a permitting of the District Court

to exercise a jurisdiction which it has assumed to exercise although it has really no power but that of might to exercise it and it is well settled that it is contrary to the policy and purposes of this Court, to acquiesce in such an improper exercise of jurisdiction.

2. If it be thought that in the petition herein there should have been included under the prayer for a mandamus a prayer for a direction that the District Court should certify the question of jurisdiction to this Court and allow the appeal direct to this Court, this petitioner respectfully suggests that this relief or an equivalent thereof is asked for in said petition.

a. Upon this petition the main question of jurisdiction is brought before this Court, and a prayer to vacate the processes and orders of the District Court against the petitioners property on the ground of lack of jurisdiction would have the same result as if they were declared to be void on appeal for that reason; and to have a mandamus issue on this petition directing the allowance of the appeal would merely bring the same question twice before the Court, once on the petition and again on the appeal. The prayer for a mandamus commanding the District Judge to dismiss the libel seems to cover the situation exactly, to be a proper form, and to lead to the same results (*In re Briz.*, 135 U. S. 403; *Ex Parte Simmons*, 247 U. S. 231).

b. If this be deemed necessary, as counsel did not believe, for the reason that as stated an appeal is not a condition precedent to an allowance of the writ of prohibition, then the prayer for such other

and further relief is sufficiently broad to cover this relief particularly as the District Court is fully aware of the point in issue, namely lack of jurisdiction of that Court and would be in no way surprised by the granting of such relief.

3. This petitioner has undoubtedly no other remedy against the decree against it which was made by a Court having no jurisdiction whatever to make it, except the remedy of a writ of prohibition and/or mandamus. Clearly it is entitled to relief, if, as shown, the lack of jurisdiction in the District Court is clear, clear enough to warrant the issuing of the writ. This Court has the power to issue the writ under the Judicial Code, Sec. 234 for this particular purpose, to prevent an improper exercise of jurisdiction. The Court also has control over its own processes and orders including the rule to show cause herein and, as a dismissal of this petition on a technicality of not having included in the rule to show cause or petition a prayer that the mandamus sought for, direct the District Court to allow the appeal in spite of the fact that an appeal is not a condition precedent to granting the writ, would work a manifest injustice, this petitioner prays that instead of dismissing the petition this Court will, if it deems such an amendment necessary, permit the petitioner to amend the rule to show cause or the petition by inserting in the prayer for a mandamus therein at the end of No. 2 in the prayer for relief the words:

> "or that a mandamus issue out of this Honorable Court to the said Francis A. Winslow, Judge of the United States District Court for the Southern District of

New York directing him to make an order vacating the order of the said District Court of Sept. 19th, 1923, which vacated the Citation on Appeal and order of allowance of appeal, granted on August 20th, 1923, and reinstating said citation and order of allowance of appeal direct to this Court from the Final Decree entered in said District Court on the 9th day of August, 1923, and that said Judge be directed to certify in due form the question of jurisdiction on said appeal to this Court"

or a similar direction in the rule to show cause and that this Court will direct a rehearing of this application upon such rule and/or petition as so amended.

POINT III.

Replying to Respondent's Brief.

1. The statement on page 3 of respondent's brief that the only basis alleged for the claim of the vessel's immunity is that its owner was either a branch or subsidiary of a Portuguese Government Department is misleading. The claim is that the Transportes Maritimos do Estado is a Department and part of the Government of Portugal and that that government did decidedly therefore directly own the vessel.

2. The assertion on page 4 of respondent's brief that the vessel was released upon the giving of a domestic surety company bond, and the evident attempt to claim that this

action was hence against the surety company is puerile. It is the Portuguese Government's property in the hands of the surety company which must ultimately answer, unless the petition herein is granted and the action is therefore clearly against the Government in effect as well as in fact.

3. There is no statement or claim that the appearance and filing of stipulations for value were the acts of the Transportes Maritimos do Estado. In fact they were the acts of C. B. Richard & Co. done without requisite authority to amount to a consent to jurisdiction. C. B. Richard & Co. had no authority to act as agents for any such purpose (Respondent's Brief, p. 6).

4. The quotation from *Bank of U. S.* v. *Planters Bank*, 9 Wheat. 904, 907 (Respondent's Brief, p. 7) is in no sense in point. This government petitioner has, by carrying cargo, not gone into partnership in any kind of business with anyone. It has not altered its status. It has engaged in business with no one and has no associates but itself.

5. The answer in this case alleged the sovereign status and the immunity of the petitioner from jurisdiction. This was admitted on the record by the motion for a decree on the pleadings. The case of the *Transportes Maritimos do Estado* in 200 App. Div. 82, turned solely on the sovereignty of the Transportes Maritimos do Estado and its suability in the New York Court, and the *Sao Vicente* case, 260 U. S. 151, did not overrule it as the latter case merely decided that a

Consul General was not an officer with such authority that he could make the petition for his government and assert its claim of immunity (Respondent's Brief, p. 10).

6. The subject matter of the suit is that which will be affected by it, and by the assertion made in petitioner's brief it was meant that government properly would have to satisfy any decree which was made against the vessel or her owners. There was no claim or suggestion that repair contracts were void *ab initio* because made by the master, but that this contract was not enforceable by an action in our courts against a sovereign power. The false statements in this last paragraph on page 10 of respondent's brief are numerous indeed. Immunity goes not to the person only but also to the property of a sovereign. The assertion that the person was the vessel and in its place has been substituted the surety company is absurd. If this were so the surety company is not a party, never has been served with process and is certainly not subject to jurisdiction herein.

7. No actual proof of the ownership of the vessel which it is stated on page 13 of respondent's brief is lacking, was required. The answer and suggestion cannot be taken alone as proof, but upon a motion for decree on the pleadings made by the libellant their contents must be taken as admitted.

8. The immunity of a foreign sovereign though it may be a privilege is one that is always conceded (Respondent's Brief, p. 8).

9. Again the respondent on page 16 of its brief repeats the same error. The Portuguese Minister does not say that his government owns the Transportes Maritimos do Estado but that the latter is a part of the former. The "Transportes Maritimos do Estado" was merely a part of the Government and the Minister therefore says that the ship was owned by the government. It was owned by that government.

10. The question of the claimed waiver of objection to suit has been sufficiently dealt with in petitioner's brief. It is enough to recall here that none of the cases on page 20 of respondent's brief refer to the immunity of a foreign sovereign and therefore do not apply.

11. In a recent case in the Eastern District of Texas, *C. B. Richard & Co.* v. *Transportes Maritimos do Estado*, an action *in personam*, with a clause of foreign attachment against the S. S. *Faro*, under which said vessel was attached, that Court dismissed the libel on the ground of the sovereignty of the respondent. The case was not reported but we attach hereto as Exhibit A, a letter from the Secretary of the Judge, showing that the Judge decided that the Transportes Maritimos do Estado was a part of the Government of Portugal and immune.

12. Referring to the quoted newspaper advertisements on page 17 of the respondent's brief, these advertisements were not for the solicitation of freight for the entire cargo of the vessel, but only for such cargo as might occupy such small

space as might be left in the vessel after all the cargo belonging to the Government, which was to be carried on the particular voyage had been stowed in the vessel.

13. As to the allegation on page 32 of respondent's brief that its time to file its claim under the notice quoted on page 22 of its brief has passed and expired, we have only to state that this claim upon which this action is brought has already been filed with the Liquidating Commission of the Transportes Maritimos do Estado service of the Republic of Portugal by the Counsel for this petitioner and the reason why the settlement of the said claim has been delayed is because of the pendency of this action.

14. The writ of prohibition and mandamus is proper in this case, for the writ should be granted where the lack of jurisdiction is clear. It is only where this lack of jurisdiction in the District Court is doubtful or obscure or where the absence of jurisdiction is uncertain or not evident in the record that the writ is denied. The writ is to prevent, as stated, an unlawful assumption of jurisdiction where none could possibly exist within the limits of a jurisdiction conferred (*In re Cooper*, 143 U. S. 472, 505, 506). In this case at Bar the absence of jurisdiction is clear, it being an attempt to exercise jurisdiction over a sovereign without its consent and the facts upon which the lack of jurisdiction as based are shown and admitted in the record.

The petitioner is entitled to relief from a decree which was made by a court having no jurisdic-

tion in the premises and which is therefore absolutely void, and it has no other remedy except by this petition for a writ of prohibition. If it be true that it might have had this question decided by an appeal through a writ of mandamus to enforce its allowance, this is no objection to the granting of this writ in this case because the lack of jurisdiction is itself clear. It is only where the Court may have some jurisdiction in the case or the lack of jurisdiction is not clear or is doubtful that a writ of prohibition is denied upon such grounds.

POINT IV.

The writ of prohibition should be made absolute.

Dated, New York City, Jan. 11th, 1923.

F. DUDLEY KOHLER,
Proctor for Petitioner,
25 Broadway,
New York City.

EXHIBIT A.

Chambers of
W. L. ESTES,
Judge.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF TEXAS.

Texarkana, Texas,
December 22, 1921.

Mr. F. Dudley Kohler,
Cunard Building,
New York City.

Dear Sir:

Your letter of December 16, addressed to Judge Estes, requesting a copy of his opinion in the case relating to the steamship "Faro," has been received by him. He is much engaged today, and has requested me to advise you that his written opinion has not yet been filed.

In this case the action was *in personam*, and proof was made not only that the vessel was owned by the Portuguese government, but also that the claim of the libelant was not against the "Faro" itself—that is, that the "Faro" was not the offending vessel.

In this state of affairs, the Court held that a foreign government could not be required, over its protest, to litigate the claim in this court, and that the vessel that had been seized should on that account be released. It was not held

that the vessel was immune from seizure, but that in this particular case the real subject matter of the suit was a claim against the Portuguese government, and that such government could not be forced to try out the merit of the claim in one of our courts, by seizing one of its vessels.

I shall be glad to prepare a copy of the evidence, and also send you a copy of the opinion, if after receiving this letter you still desire it.

Yours truly,

MARY C. MATSON,
Secretary.